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No. 10995

United States
Circuit Court of Appeals
For the Ninth Circuit.

CONTRACTORS, PACIFIC NAVAL AIR BASES, an Association, and LIBERTY MUTUAL INSURANCE COMPANY, a Corporation,

Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner of the United States Employees' Compensation Commission for the Fourteenth District and JOHN B. PIATT,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division

Rotary Colorprint, 661 Howard Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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*Page numbering appearing at foot of page of original certified Transcript of Record.

In the District Court of the United States for the Western District of Washington, Northern Division

No. 851

LIBERTY MUTUAL INSURANCE COMPANY, a corporation and CONTRACTORS, PACIFIC NAVAL AIR BASES, an association,

Libellants,

vs.

WM. A. MARSHALL, Deputy Commissioner of United States Employees' Compensation Commission for the Fourteenth District and JOHN B. PIATT,

Respondents.

BILL OF COMPLAINT FOR MANDATORY INJUNCTION

Come Now the libellants above named and for Bill of Complaint against the respondents allege:

I.

That the libellant, Liberty Mutual Insurance Company, is now and was at all times herein mentioned, a mutual insurance corporation organized and existing by virtue of the laws of the State of Massachusetts and authorized by the United States Employees' Compensation Commission to provide compensation insurance protecting the employees under the Longshoremens' and Harbor Workers' Compensation Act as amended, and particularly by Public Law 208, 77th Congress, Act of August 16,

1941, hereinafter referred to as The Act, and the insurance carrier provided by libellants, Contractors, Pacific Naval Air Bases, an association, in accordance with the provisions of the Act.

II.

That the libellant, Contractors, Pacific Naval Air [2] Bases, is now and was at all times mentioned herein an association of contracting firms engaged in building and erecting military and naval installations for the United States, particularly in the islands of the Pacific Ocean.

III.

That the respondent, William A. Marshall, is now and was at all times mentioned herein, Deputy Commissioner of the Fourteenth Compensation District under the provisions of the Act, and his office is located at Seattle within the judicial district of the above entitled court.

IV.

That on or about August 13, 1939, the libellant, Contractors, Pacific Naval Air Bases, employed John B. Piatt as a civilian employee to work at a base on the Hawaiian Islands occupied or used by the United States for military or naval purposes, and that said John B. Piatt continued in such employment and as such employee of said libellant until on or about February 26, 1943.

V.

That on or about February 26, 1943, the said John B. Piatt suffered a cerebral thrombosis as a result of vascular disease and hypertension, rendering him unable to continue the performance of his duties as an employee of the Contractors, Pacific Naval Air Bases.

VI.

That on or about May 25, 1943, the said John B. Piatt filed claim for compensation for disability with the said United States Employees' Compensation Commission, under Public Law 208, 77th Congress, Act of August 16, 1941, alleging that the cerebral thrombosis was the result of an accident which occurred on or about December 1, 1942 when a [3] heavy glass reflector shade dropped and hit him on the head while in the employment of said contractors, Pacific Naval Air Bases.

VII.

The cause was within the jurisdiction of the Deputy Commissioner for the Pacific District with headquarters at Honolulu, Territory of Hawaii, but with the approval of the United States Employees' Compensation Commission and as permitted by law, was subsequently transferred to the Fourteenth Compensation District, William A. Marshall, Deputy Commissioner.

VIII.

That the libellant herein gave due notice that said claim was controverted and denied that the

disability commencing on February 26, 1943 was caused by or resulted from the injury sustained on December 1, 1942, and on June 2, 1943, testimony in this matter was heard at Honolulu, Territory of Hawaii, before John C. Gray, Deputy Commissioner for the Pacific District, at which time the testimony of claimant John B. Piatt, his wife Freda F. Piatt, George L. Youmans, Commander H. P. Potter, U.S.N.R., and A. W. Morgan, was heard and transcribed and certain exhibits made a part of the record; that pursuant to oral stipulation, the matter came on for an adjourned hearing before the said John C. Gray, Deputy Commissioner, on the 30th day of June, 1943, at which time the testimony of Dr. Ralph B. Cloward, M.D., was taken and transcribed. That the cause was then transferred, as permitted by law, to the Thirteenth Compensation District, W. H. Pillsbury, Deputy Commissioner, who in turn transferred the cause to respondent Wm. A. Marshall, Deputy Commissioner of the Fourteenth Compensation District. [4]

IX.

That no additional hearing was had before respondent Wm A. Marshall, and the only other evidence submitted to him were the medical reports of Drs. Howard A. Brown, M.D. and Ernest H. Falconer, M.D., both of whom concluded that there was no possible connection between the cerebral vascular accident occurring in February, 1943 and the head blow of December, 1942.

X.

That thereafter on November 29, 1943 respondent Wm. A. Marshall made and entered his compensation order and award of compensation, a copy of which is attached hereto marked "Exhibit A" and made a part hereof as fully as if set forth at length herein. That said compensation order and award of compensation is not in accordance with law and with the provisions of the Longshoremens' and Harbor Workers' Compensation Act in this, that there was not at any time herein mentioned or at any other time any substantial evidence before said respondent Wm. A. Marshall, to the effect that the cerebral thrombosis that occurred on February 27, 1943 was caused by the injury that occurred on December 1, 1942; that in truth and in fact, all of the medical testimony submitted in the cause was to the effect that the cerebral thrombosis which occurred in February, 1943 was caused by vascular disease and hypertension, and would have occurred regardless of whether respondent John B. Piatt would have received a head injury in December, 1942 or not. That in making said order and award, respondent Wm. A. Marshall acted capriciously and without giving due regard to medical evidence submitted in the cause. [5]

XI.

That the Liberty Mutual Insurance Company is joined as a libellant herein because the Longshoremens' and Harbor Workers' Act provides for the

substitution of the insurance carrier for the employer.

XII.

That all the notices and the duly transcribed original notes of testimony taken in the cause and the original compensation order and award of compensation of respondent Deputy Commissioner Wm. A. Marshall, are in the custody of said respondent, together with all exhibits submitted in connection therewith, and it is necessary for this court to have possession of said records and all of the relevant papers in the possession of Deputy Commissioner Wm. A. Marshall in order to determine whether or not the compensation order and award of compensation of said Deputy Commissioner is in accordance with law.

XIII.

That the libellants will be irreparably damaged if a mandatory injunction annulling and vacating said award is not granted them by this court.

XIV.

That the libellants have not the right to appeal from the aforesaid compensation order and award of compensation and have no remedy available other than the redress requested by libellants in the form and manner specified in the Longshoremens' and Harbor Workers' Compensation Act.

Wherefore Libellants respectfully pray as follows: [6]

1. That the said respondent Deputy Commis-

sioner be ordered to deliver to this court or the clerk thereof a certified transcript of any claim for compensation made in this matter, all notices, transcribed notes of testimony, exhibits, compensation order and award of compensation aforementioned, and all other papers and records, or matters relating to this cause or the hearing thereof.

2. That a time and place be set so that said matters and records may be fully heard and considered by this court.

3. That said compensation order and award of compensation made by said respondent Deputy Commissioner against libellants herein, be annulled, reversed, vacated, and set aside by mandatory injunction or otherwise as provided in the Longshoremens' and Harbor Workers' Compensation Act aforesaid.

4. That libellants be granted such further relief as may be meet and proper in the premises.

JOSEPH J. LANZA
EGGERMAN, ROSLING &
WILLIAMS
Attorneys for Libellants [7]

EXHIBIT A

United States Employees' Compensation Commission, Fourteenth Compensation District

Case No. DB-P-1-4042

In the matter of the claim for compensation under Public Law 208, 77th Congress, Act of Congress, Act of August 16, 1941.

JOHN B. PIATT,

Claimant,

against

CONTRACTORS, PACIFIC NAVAL AIR BASES,

Employer,

LIBERTY MUTUAL INSURANCE COMPANY

Insurance Carrier.

COMPENSATION ORDER AWARD OF COMPENSATION

A claim for compensation having been filed in the Pacific District and a hearing having been held in Honolulu, Territory of Hawaii, before Deputy Commissioner Gray, and the matter having been transferred to this, the Fourteenth Compensation District, by authority of the Commission for such further action as might be indicated, and such further investigation having been made as is considered necessary and no additional hearing having been requested by the parties,

The Deputy Commissioner makes the following

FINDINGS OF FACT

That on the 1st day of December, 1942, the claimant above named was in the employ of the employer above named at a place within the Pacific District, established under the provisions of the Longshoremens' and Harbor Workers' Compensation Act, as extended by the Act of August 16, 1941, as amended (42 U.S.C., Sec. 1651), to employees of contractors with the United States, and others, employed outside of the United States, and that the liability of the employe for compensation under said Act was insured by the Liberty Mutual Insurance Company;

That on said day claimant herein while performing service for the employer sustained personal injury resulting in his disability while employed as a procurement agent; that while so employed and working at his desk an electric light reflector shade fell and struck the claimant's head, causing injury and resulting in his disability;

That the employer had knowledge of the said injury;

That the employer furnished claimant with medical treatment, etc. in accordance with section 7 (a) of said Act;

That the average annual earnings of the claimant at the time of said injury were in excess of the [8] maximum provided by the Act;

That as a result of the said injury the claimant was wholly disabled from December 1, 1942, to and including January 10, 1943, and from February 26, 1943, to and including November 18, 1943, and he is entitled to 43-6/7 weeks' compensation

at $25.00 per week for such disability or $1,096.43; that on November 19, 1943 the total disability of the claimant resulting from the said injury continued;

That the employer and insurance carrier have paid to the claimant $546.43 as compensation;

Upon the foregoing facts the Deputy Commissioner makes the following

AWARD

That the employer, Contractors, Pacific Naval Air Bases, and the insurance carrier, Liberty Mutual Insurance Company, shall pay to the claimant compensation as follows: $1,096.43, covering to and including November 18, 1943; that the employer and insurance carrier shall have credit on this award for $546.43; that subsequent to November 18, 1943 the employer and insurance carrier shall pay compensation to the claimant bi-weekly at the rate of $25.00 per week during the continuance of the said disability; that the total compensation payable under this award shall in no event exceed $7,500.00.

Given under my hand at Seattle, Washington, this 29th day of November, 1943.

WM. A. MARSHALL

Deputy Commissioner, Fourteenth Compensation District.

Received a copy of the within Bill of Complaint for Mandatory Injunction this 29th day of December, 1943.

J. CHARLES DENNIS
Attorney for Plaintiff

[Endorsed]: Filed Dec. 29, 1943. [9]

CERTIFICATION OF RECORD

This is to certify that the following described documents constitute the record of proceedings in connection with the claim of John B. Piatt against Contractors, Pacific Naval Air Bases, employer, and the Liberty Mutual Insurance Company, insurance carrier:

Transcript of testimony taken at hearing held by Deputy Commissioner John C. Gray at Honolulu, T. H. on June 2, 1943.

Employers and insurance carrier's Exhibit A, Part 1, being photostatic copies of hospital records.

Employer's and insurance carrier's Exhibit A, Part II, being photostatic copies of hospital records.

Report of Dr. Howard A. Brown, dated June 23, 1943.

Report of Dr. E. H. Falconer dated 6-23-43.

Telegram addressed to John B. Piatt, dated June 11, 1943, and signed by Dr. Robert Bulman.

Compensation order filed by the undersigned on November 29, 1943.

WM. A. MARSHALL
Deputy Commissioner.

Seattle, Washington, December 29, 1943

[Endorsed]: Filed Jan. 22, 1944. [10]

United States Employees' Compensation Commission

Before John C. Gray, Deputy Commissioner, Pacific District.

Case No. DB-P-1-4042.

JOHN B. PIATT,

Claimant,

vs.

CONTRACTORS, PACIFIC NAVAL AIR BASES,

Employer,

LIBERTY MUTUAL INSURANCE CO.,

Insurance Carrier.

TRANSCRIPT OF TESTIMONY AND PROCEEDINGS

Pursuant to oral stipulation, the above entitled matter came on to be heard before John C. Gray, Deputy Commissioner, United States Employees' Compensation Commission, Honolulu, T. H., on Wednesday, June 2, 1943, at 1:45 o'clock p.m., the

hearing being held at the home of the Claimant, 646 Wyllie Street, Honolulu, T. H.

Appearances:

John B. Piatt, Claimant, in person,
C. F. White, Esq., appearing on behalf of the employer and insurance carrier.

Reported by: R. N. Linn, Judiciary Bldg., Honolulu, T. H. [13]

Commissioner Gray: This is a hearing before the United States Employers' Compensation Deputy Commissioner in the case of John B. Piatt, an employee of the Contractors, Pacific Naval Air Bases, an association performing contract work on lands used or occupied by the United States for military or naval purposes, within the Pacific District, of the Compensation Commission, authorized by Public Act 208, approved August 16, 1941,—the so-called Defense Bases Act Mr. Piatt is present in person.

Are you represented by counsel, Mr. Piatt?

Claimant: No, sir.

Commissioner Gray: The employer and insurance carrier, the Liberty Mutual Insurance Company, are represented by Mr. C. F. White of the Mutual—Liberty Mutual Insurance Company.

Mr. Piatt has filed formal claim with the Commission, which was received May 25, 1943, in which he alleges that on or about December 1st, 1942, while in the employment of the Contractors, Pacific Naval Air Bases, a burned-out light being changed by a

co-employee fell, and the reflector struck him on the head, causing him to sustain a perion of temporary-total disability, and Mr. Piatt further alleges that the blow caused concussion of the brain followed by continuous high blood pressure, with cerebral thrombosis, which manifested itself on or about February 27th 1943. A copy of this claim was received by the Insurance Carrier on May 25, 1943, and the hearing has been called without notice by agreement between the [14] parties. Is that correct?

Mr. White: Correct.

Commissioner Gray: Does that in substance represent the primary context of your claim, Mr. Piatt?

Mr. Piatt: Yes, sir.

Commissioner Gray: Mr. White, do you wish to put on your witnesses first, or would you rather have me question Mr. Piatt?

Mr. White: I believe that these gentlemen here were brought here at Mr. Piatt's request. We are not controverting the accident or the injury on December the 1st 1942. As I see it, the sole question at issue at the present time is whether or not the accident of December 1, 1942, and the so-called cerebral accident on February the 26th or 27th had any actual relationship either directly or indirectly.

I think it is noted in the claim for compensation that there was a return to light work which was interrupted again on or about February 26th or 27th.

Commissioner Gray: We will bring that out later, Mr. White. We have an answer filed here by the Carrier in which it is admitted that the applicant sustained an injury on or about the date set forth in the application, December 1, 1942. It is admitted that both the employer and employee were subject to the Longshoremens' and Harbor Workers' Compensation Act at the time of the alleged injury, being public act Number 208.

It is admitted that the relationship of employer and employee existed at the time of the injury. [15]

It is admitted that at the time of the alleged injury the employee was performing service growing out of and incidental to his employment.

It is admitted that notice of injury was given employer as specified in application.

It is admitted that applicant was temporarily disabled following the injury for the period stated in the application, and it is admitted that the rate of wages as set forth in application is correct; namely, being in excess of $37.50 per week.

It is denied that the applicant was permanently disabled to the extent stated in the application.

It is denied that disability commencing on February 26th or 27th, 1943, the date to be shown by evidence, was caused by or resulted from the injury sustained on December 1, 1942.

Those denials, Mr. Piatt, have just been received, and, under the law, of course you have ten days, if you desire, in which to produce any evidence, if you desire to exercise that perogative. If you want to waive the ten day's notice, we would like

to have you so state, in order that we may proceed. Do you waive any necessity for ten day's preparation on this case?

Claimant: I did not quite get all the denials.

(Denials are reread to the Claimant.)

Commissioner Gray: Do you want any further time to prepare on it, or do you waive the notice.

Claimant: I waive the notice.

Commissioner Gray: All right. [16]

JOHN B. PIATT

the claimant, was called as a witness, and being duly sworn, testified as follows:

By Commissioner Gray:

Q. State your name and address to the reporter, please.

A. John B. Piatt; my address here is 646 Wyllie Street, Honolulu.

Q. What will your address on the mainland be?

A. I cannot tell you as yet. We are going back to California first. It is going to be Ashland, Oregon.

Q. On or about December 1st 1942 were you employed by the Contractors, P.N.A.B.?

A. Yes, sir.

Q. What was your position?

A. I was employed as procurement agent for the Naval Construction Battalions.

Q. By the Contractors, P.N.A.B.?

(Testimony of John B. Piatt.)

A. Yes, sir.

Q. What was your annual rate of pay.

A. If I may give it.——

Q. Now you are testifying before a government official; we know for ordinary purpose that figure is confidential, but for the purpose of the hearing we have to have it, in view of the fact that there is a claim of partial disability.

A. I was being paid at the rate of $450. a month.

Q. Did you receive any emolument over and above the cash [17] wage paid?

A. Yes, sir.

Q. Of what value, per month?

A. Eight hundred dollars last year, divided by 12, would be about a little less than $70.—about $67.50.

Commissioner Gray: Does the carrier agree that the average monthly wage of Mr. Piatt approximately closely $515.50 a month?

Mr. White: Q. The $800. that you refer to has accrued strictly for a bonus?

A. That is bonus.

Mr. White: Yes, we will agree to that.

Commissioner Gray: It will be so accepted.

Q. Mr. Piatt, will you kindly describe any untoward event that occurred about December 1st 1942 when you were in employment?

A. I arrived in my office just about 9:25 that morning, and I sat down at my desk, and my stenographer told me that my upstairs office had

(Testimony of John B. Piatt.)

a lot of requisitions to be signed, and Commander Potter of the 5th Battalion was in a hurry for them, and I had her 'phone up to have the girl upstairs bring them down to me, and they brought them down and put them on my desk and I pushed my chair back to get out of the way of the young lady that brought them down, and started in to sign the requisitions, and the lamp, a regular reflector shade, suddenly hit me on the head. I didn't realize what had happened. I just [18] felt a ringing and a splutter of glass went all over my shoulders, and that shade had broken loose and hit me on the top of the head, and pieces of glass flew all over the office.

Q. Did you continue to work?

A. No, sir.

Q. Just relate what happened afterwards, then?

A. Mr. Boskhen—Boshen——

Q. What is his first name?

A. "Hank" they call him; H. C. Boshen, he showed up. He was in the office right across the hall and he came in the doorway with Mr. Frank Shmidtz, one of the operating committee,—another one of the operating committee project managers, and they, my girls, 'phoned for Mr. Morgan to come downstairs; he was upstairs, my assistant, and I don't remember which two, but two of them took me across to the first aid station and I walked over there between them.

Q. Did you receive treatment?

(Testimony of John B. Piatt.)

A. At the first aid station they had me lie down and they put an icepack or ice-bag on my back, and on my head, and gave me some pills, I don't know what they were, probably aspirin, and they kept me there for about better than half an hour, and then they made out a card or memorandum and sent me to Dr. Stewart of the Medical Center, —I don't recall his initials,——

Mr. White: Dr. Steele F. Stewart of the Medical Group.

A. Yes. One of the boys took me down on the car to Dr. Stewart. [19] His name does not appear in my statement there.

Q. Did Dr. Stewart treat you?

A. Dr. Stewart,—I had received a cut on the upper forehead, on my scalp, very close,—a very small cut, and there was a piece of glass sticking in it, and Dr. Stewart cleaned that out; took it out and painted it, and looked me over, and then told me to go home and keep quiet for 24 hours, which I did.

Q. And then what transpired?

A. Commander Keim,—Do you want the details and the names; how it happened?

Q. It is perfectly all right.

A. Commander Keim of Public Works 'phoned the house that afternoon, while I was staying home, requesting that I go out to the office with him; he wanted to have a meeting with Commander Potter and Commander Alcott, and he said it was very important, but we told him that I could

(Testimony of John B. Piatt.)

not go, but had to stay quiet for 24 hours, and he said "I will come up in the morning and pick you up, and we will go then if you can," and the next morning, that was the morning of the 3rd, after it happened, he came up and picked me up and we went out to Commander Potter's office and then went on over but Commander Potter was not in yet, and he called them up, Potter and Alcott, and Alcott and Potter both came over to my office, and we had a meeting, or discussion, there, that Keim wanted,—and——

Q. How long did the meeting last?

A. Oh, it must have lasted about an hour and one-half. [20]

Q. Did you feel any distress at that meeting?

A. I started to get,—I got dizzy and felt pretty rotten, and finally I told them I had had all I could stand of it, and I got up and walked in Mr. Youman's office, and told Mr. Youman I was feeling pretty rotten, and I was going to have to go down and get checked up by somebody who knew something about head trouble, and I told him I was going to go down and see Dr. Cloward and I had heard about him, and I told him I wanted to go down and see him.

Q. When you were talking with Mr. Youman you are pretty sure he knew what had transpired on December 1st?

A. He knew what had happened.

Q. Did you tell him during this conversation or recall to him the event?

(Testimony of John B. Piatt.)

A. When I went in on the morning of the 3d he knew that I had been hit in the head, I presume, and I went in and told him that I felt very bum and I felt like I had a little concussion, I remember telling him that, and that I was going downtown to get checked up, and that of course met with his assent.

Q. You are both more or less key men of the company? A. Yes, sir.

Q. And you did not do like the workmen, go up and ask the foreman, you just discussed things and took it for granted it would be noted?

A. I wanted to let him know that I was going, and I felt like [21] I had been hurt worse than it appeared, and so forth.

Q. And you went down to Dr. Cloward's?

A. To Dr. Cloward's office.

Q. Was Dr. Cloward there?

A. He was not there. His nurse was, and I saw her.

Q. What is her name, do you know?

A. I don't know her name. I think the name of the first one I saw, at that time, was Edith. I don't know her last name.

Q. Miss Edith.——

A. She called Dr. Cloward and she said he was out operating and she thought he was over at Kaneohe, and she would try to get ahold of him as soon as possible, and she took the story, and said "You go home and I will have Dr. Cloward call you right away as soon as he can get in touch with you."

(Testimony of John B. Piatt.)

Q. By "the story" you mean you gave the history of what had happened and she recorded it, is that true? A. Yes, sir.

Q. So you went home then?

A. I came right up to the house.

Q. When did they call you, or call your wife?

A. As I recall it was about four o'clock in the afternoon, between 3:30 and 4.

Q. What directions did you receive from the doctor?

A. He told Mrs. Piatt to have me go right to the hospital, and he would make arrangements for admission, and he would come [22] right over and see me.

Q. You did go?

A. I went to the hospital and he met me there right away.

Q. Let's get the date you were admitted to the Queen's Hospital? A. The Queen's Hospital.

Q. On what date?

A. The 3d of December.

Q. And how long were you in the hospital?

A. I was in the hospital in December. Doctor Cloward let me come home on Christmas evening, December 24th.

Q. Were you a bed patient at all times at the hospital?

A. I was a bed patient at all times at the hospital.

Q. You came home on December 24th. Have

(Testimony of John B. Piatt.)

you been able to resume your usual duties since, Mr. Piatt?

A. During January, after I was able to get up and walk around, Dr. Cloward had me come down in the car; I was taken down in an automobile with a driver; Commander Potter send a C.B. driver to take me down, and I went down for a check-up.

Q. About what time would that be, do you recall?

A. I had been home about a week, as I recall; I am not exactly sure. It was the first week in January, Mr. Gray.

Q. It says here on the claim, simply to remind you,—it says: "Have you done any work in period of disability?" and the answer is: "From January 12th to February 27th, part time." Does that [23] agree with your notes and records?

A. Yes, that is true.

Q. Now were the duties you performed during this inclusive period, January 12th to February 27th, wholly supervisory, or was there any manual moving about or work connected with it?

A. When I first went out there all I went out to do was,—I acted just simply in an advisory capacity for consulting on purchases, for my assistants. There have been a lot of additional requirements added on for ordering materials, and at that time I had a lot of that information in my mind and head, and I went out and stayed there and gave them all the help I could.

Q. What were your mental and physical sensations during that period that you were out there

(Testimony of John B. Piatt.)

trying to assist in an advisory capacity, between January 12 and February 27, 1943?

A. The first week or ten days I was out there I got very tired very quick, but I was very careful not to stay there more than about three hours on any day.

Q. Were you under medical observation during the entire period?

A. I was under medical observation during the entire period, and I was going down, and having the driver take me down, at least once a week, and sometimes twice a week, to see Dr. Cloward, and he checked me up, and checked my blood pressure and looked me over every time I was there and told me it was all right to go and stay at the office as long as I did not overdo, and I did [24] not stay at the office more than about three hours every day the first week. After the first week I added on a half hour at a time, and a little more, and the last three days I was out there I did stay practically the full time, the last three days.

Q. That would be, approximately, the 25th, 26th and 27?

A. Just about, yes, sir; February 24th, 25th and 26th.

Q. And you have not done any work since then?

A. None since.

Q. And you are going back to the mainland?

A. Going back to the mainland.

Q. Mr. Piatt, how old are you?

A. I was born in 1888; that would make me about 55, in July.

(Testimony of John B. Piatt.)

Q. For how long have you been employed?

A. I was employed by the Contractors since December, 1939.

Q. I mean, since you became an adult, how long have you been employed?

A. Oh, all the time.

Q. Have you ever had any lengthy periods of disability causing you to cease work over any critical, cardiac conditions: so-called "heart disease"?

A. No, sir.

Q. Have you ever had any long periods of disability from illness or disease?

A. In 1937, in August and September, I had pneumonia, in Santa Rosa, California; I was sick about six weeks, as I recall. [25]

Q. Have you ever had any major accidents resulting in injury?

A. I haven't had any accidents since 1929.

Q. I imagine you are a college man, are you not, Mr. Piatt? A. No, sir, I am not.

Q. Did you indulge in athletics very much when you were a young fellow?

A. I played football when I went to high school.

Q. Did you ever sustain any severe head injuries while playing football?

A. None whatever, sir.

Q. In view of the fact that you are shortly returning to the mainland, and the probabilities are that we are going to have further hearings in this case in order to bring in all of the medical evidence that we can get ahold of, if you leave I would like

(Testimony of John B. Piatt.)

to have you state for the record whether or not you are willing to waive appearance at a subsequent hearing that we may hold here in order that we can get Dr. Cloward's evidence, and bring other doctors' evidence in? A. Certainly, sir.

Q. It being understood that the deputy commissioner is representing all parties in interest, and will do his best to see that the evidence is fully brought out, whether for or against you.

A. Yes.

By Mr. White:

Mr. White: For your information, and in that connection, Mr. Gray, I want to state for the record that this hearing was [26] set at 12:30 today in the belief that Dr. Cloward would be available as a witness, and on yesterday afternoon he informed me that due to a major operation he had to perform this morning, he would not be able to be here, and it would not be before this afternoon that he would be able to determine whether or not he could be present at a continuation of the hearing later on this week, before Mr. Piatt gets away. If such can be arranged, we will be glad to come out here again, provided Dr. Cloward will agree to come and we can make the arrangement.

Q. Mr. Piatt, were you examined for your employment on this contract with P.N.A.B.?

A. No, sir.

Q. Have you had occasion to receive medical attention, other that the attention you have de-

(Testimony of John B. Piatt.)

scribed, in answer to Mr. Gray's questions, since coming to the Islands? A. Only once, sir.

Q. What was the occasion for that?

A. I would like to amend that. I would like to say "twice." I have been going to Dr. Van Poole, Holmes & Van Poole, Dr. Van Poole, the ear specialist, for dilation of my left ear, the eustachian tube, for a considerable period; in fact, ever since I have been out here. And then there was another, in June of last year, 1942, I just happened to be seated in the rear of a pick-up, driving up from the waterfront,—I was down to the waterfront offices of the company, in the yard, and some new crane [27] operator was practicing and the driver didn't know he was there, and happened to just get opposite him, when he swung a load of reeinforcing steel around and it banged into and smashed in the car door, and hit me in the elbow, and that is how I happened to go to Dr. Stewart in the beginning. They sent me down there for an examination.

Q. I believe that was in June, 1942, wasn't it?

A. Yes, about the 19th of June, I think; I am not sure.

Commissioner Gray: Do we have a report on that?

Mr. White: Yes.

Q. Those are the only two occasions on which you have visited doctors, Dr. Van Poole for your ear condition, and Dr. Stewart for your elbow?

A. Yes.

(Testimony of John B. Piatt.)

Q. Do you know whether either of those doctors at any time took your blood pressure?

A. To the best of my remembrance they did not.

Q. You know how that is done?

A. Yes, I know.

Q. By binding the arm and taking a mercury column reading? A. Yes.

Q. You mentioned, as your last serious illness, pneumonia, in 1937, while you were in Santa Rosa, California? A. Yes.

Q. Were you attended by Dr. Robert Bulman at that time? [28] A. Yes, sir.

Q. Do you recall, off-hand, whether he had occasion to check your blood-pressure at that time?

A. I do not recall. To the best of my memory I don't think he did. I am not certain.

Q. For the record, is it correct to say that you have joined in sending a telegram to Dr. Bulman?

A. Yes, sir, I did.

Q. With the idea in mind of getting the results of any reading he may have made during that illness? A. Yes, I did.

Q. (By Commissioner Gray) Do you desire to submit any such report for the consideration of the Deputy Commissioner if it is received?

A. Yes, certainly.

Commissioner Gray: Do you have any objection to such a report?

Mr. White: No, I don't have any objection. What I think Mr. Piatt and I were both trying to get at

(Testimony of John B. Piatt.)

was whether he did have an elevation in blood pressure at this time.

Commissioner Gray: If you are willing to have such a stipulation here in this opening hearing, at such time as you receive it, it will be made a part of the record.

Claimant: In the radiogram, Mr. White, it calls for any answer to be sent to the Liberty Mutual Insurance Company. [29]

Mr. White: I will be glad to submit a copy of any reply that is received. Due to naval requirements it is not possible to request a collect wire, and I had to guarantee in the telegram the cost of the reply of Dr. Bulman, and I haven't heard from him today. This may mean that he is not at Santa Rosa, or hasn't been able to check on that information, but as soon as a reply to this wire is received, whether in the form of a radiogram or of a letter, we will be glad to stipulate it may go in the record, and submit it.

Commissioner Gray: The deputy commissioner will receive any evidence, if received, and will receive in evidence a copy of the radio communication, sent via R.C.A. Communications, Incorporated,, on June 1st 1943, to Dr. Robert Bulman, by John B. Piatt, it being understood that the reply, if received, will be made a part of the record, upon stipulation, as already made by both interested parties, and the exhibit will be marked Deputy Commissioner's Exhibit Number 1.

(Testimony of John B. Piatt.)

(Copy of radiogram marked Deputy Commissioner's Exhibit Number 1.)

DEPUTY COMMISSIONER'S EXHIBIT No. 1

Radiogram

R. C. A. Communications, Inc.

Received at 223 South King St., Honolulu at 1943 Jun 11 PM 1 00 Standard Time

1618 28 Santarosa Calif 11 1119 A ASF
L. C. John B. Piatt
646 Wylie Street Honolulu
No record of blood pressure of John D. Piatt in 1937 118 over 80 in January 1935

DR ROBERT BULMAN

Received Aug 13 1943 District No. 14
4605
230947
Pass 6

[Endorsed]: Filed Jan. 22, 1944.

Q. Mr. Piatt, do you recall the last occasion previous to 1937 on which you had a general physical check-up or examination? I believe at one time you mentioned an examination for life insurance, about 1931.

A. It is 1929, sir. I was examined for life insurance consolidated policies, in Connecticut General Life, in 1929. [30]

(Testimony of John B. Piatt.)

Q. And was that consolidation granted?

A. Yes, it was passed. That was a twenty thousand dollar health policy at that time.

Q. Were you given an examination by a life insurance doctor at that time?

A. I was, yes, sir.

Q. And he found nothing wrong with you?

A. The policy was allowed; that is all I know.

Q. Mr. Piatt, I think we are agreed that the accident occurred on December 1st?

A. Yes, sir.

Q. And that two days later, on December the 3d. late in the afternoon, you went to the Queen's Hospital? A. Yes, sir.

Commissioner Gray: Before we go any further, do you have any objection to that Exhibit 1 being made part of the record?

Claimant: None whatever, sir.

Q. I believe that the second point I want to clear up on the dates, is the date of your return to work. That was reported by Mr. Biddle as January 11th, and we paid temporary-total compensation on that basis, but if there is another date in your mind we can have it rechecked.

A. I will concede it was the 11th instead of the 12th of January.

Q. Now then the next date, the last one, I think, is the date [31] of your second admission to Queen's Hospital. I have here what purports to be a photostatic copy of a copy of the Queen's Hospital record, which indicates that you were admitted at 7:40

(Testimony of John B. Piatt.)

a.m. on February the 26th, and this notation indicates that at the time this was made you were still in the hospital, as of March 26th. After checking on the date a little further, do you agree that it was February 26th? A. I agree, yes, sir.

Q. And do you recall when you left the hospital; what date?

A. I don't recall what date it is. We have it on our calendar out here.

Q. I think I can refresh your memory on that. Would it be May the 5th?

A. Was that Sunday?—Was that a Wednesday? (Consulting calendar)

Q. No, it does not give the date of the week here. A. May the 5th, yes, sir.

Q. Were you continuously under the care of Dr. Cloward after you went to the hospital on December the 3d, 1942? A. Yes, sir.

Q. And during the second period of your stay in the hospital? A. Yes, sir, I was.

Q. Did any other physicians attend you other than the house physician?

A. Dr. Gotshalk in the Young Building made an electrocardiograph, and a report on the heart, for Dr. Cloward.

Q. For Dr. Cloward? [32] A. Yes.

Q. Was that while you were in the hospital or afterwards?

A. No, between there, when I was out in December and January sometime; in January.

(Testimony of John B. Piatt.)

Q. Do you recall whether that was before or after you had gone back to sedentary work?

A. That was before I was,—That was just at the time when Dr. Cloward said I could go back. He wanted to check up and see if there was any reason,—if there was any possible heart lesion that was helping keep up the blood-pressure, and he checked me up and said "You are o.k." As a matter of fact Dr. Cloward told me at that time that he would pass me for life insurance.

Q. On the basis of Dr. Gotshalk's findings?

A. On the basis of finding that out. Mr. Gray, there is one point I want to go into.

Commissioner Gray: Just a moment. We will allow Mr. White to finish his cross-examination, if you please.

Q. After you had gone back to work on January 11th, Mr. Piatt, can you describe briefly what your general physical condition was? Did you appear to improve, or did you have periods when you were not as well as at other times?

Commissioner Gray: I think you should reframe your question. I do not think he is qualified to testify to his physical condition. He might testify as to his sensations and personal feeling.

Mr. White: All right. [33]

Q. On your discharge from the hospital, Mr. Piatt, did you feel fully recovered?

A. No, sir.

Q. Did you have any residual effects, like headaches?

(Testimony of John B. Piatt.)

A. I had headaches, like a tight band across the top of my head, and headaches in the rear of my head, and was pretty wobbly,—weak.

Q. I think you described the band as extending from across your head, practically the latitude of the ears? A. Yes.

Q. And around at the back of the head?

A. Yes, about the base.

Q. Of the brain or the skull?

A. The base of the skull. I don't know where my brain is there.

Commissioner Gray: The witness designates a point in the skull, in the rear portion of his head.

Q. In response to one of Mr. Gray's questions you described a slight cut on your,—I think you said forehead. Will you describe again where that was. A. Here. (Indicating)

Commissioner Gray: The witness designates a point about one inch above the hair line right above the skull, on the forehead.

Q. Is that the spot you were struck by the falling globe?

A. The blow of the globe hit me right above here. (Indicating) [34]

Commissioner Gray: The witness designates a a point running diagonally across the top center portion of the skull as being the site of blow.

Q. You were apparently cut by fragments. Do you know whether the globe fell in front of you, on the desk?

(Testimony of John B. Piatt.)

A. A lot of it lit on the desk, and it cascaded over the shoulder, and lit on the floor, and it flew and hit the wall, and flew in every direction.

Q. Were you rendered unconscious by that blow?

A. No, I was knocked dizzy, and I slumped forward down on my desk, but I was not rendered unconscious.

Q. After you were slumped forward did you immediately resume a sitting position, or stand up, or what did you do? Do you know?

A. I could not tell you. I don't know.

Q. How long after the accident did the sensation of dizziness last?

A. I was dizzy all the time I was over in the first-aid station, on the way down to see Dr. Stewart, and all the time I was there, until I got back to the house.

Q. And on the following day how did you feel?

A. I felt all right while I was lying down, but I would get dizzy when I,—if I raised up my head.

Q. Well, now, getting back to the time that you left the hospital, on the first occasion, you described the bands of pressure across your head; how long did that sensation and the [35] headache last after you had left the hospital?

A. To the best of my recollection it was continuous for approximately the first week, and it was recurrent thereafter, but did not last.

Commissioner Gray: Let me interpose a few questions.

Q. Since you received your original injury, has

(Testimony of John B. Piatt.)

your mind been wholly free at all times, and your memory, is it capable of retaining events as clearly as it did prior to your injury? In other words, have there been times since your injury when you felt you have forgotten things?

A. There has been. I have had a hard time to remember names of people, and I try to recall.

Commissioner Gray: Under those circumstances I think we should pursue a different line of questioning, as the actual condition can be brought out by the doctor, and I do not believe his evidence on the point would be too strong.

Mr. White: No, I don't want to be confusing in my questions. I did want to get a general idea as to how long he felt bad or if it ever did improve. Let me put the question that way.

By Mr. White:

Q. Did you ever become wholly free of the tightness across your head and the headache; that is, prior to February 26th, the day you were admitted to the hospital; for the period between the time you left the hospital, and February 26th, did the [36] headache and the tight feeling remain with you?

A. It was, to the best of my memory, it was recurrent every day; I had a sensation of it, a feeling of it there, at different periods, every day during that period.

Q. Was it always at one time of day or did it occur at different times?

(Testimony of John B. Piatt.)

A. I could not recall.

Q. Will you describe, Mr. Piatt, what occurred on February the 26th, the morning of which you again reentered the hospital?

A. I got up and had gone into the bathroom, to get ready to go to work, and was standing at the wash basin, the lavatory, and I grabbed hold to support myself, and I felt my knees starting to give way, and I could not stand up, and I tried to call Mrs. Piatt, and I could not call, and I could not talk,—I just slumped on the floor, and she came and found me there.

Q. What day of the week was that?

A. I think it was Friday.

By Commissioner Gray:

Q. You were about to make a remark a few moments ago, Mr. Piatt. What did you have on your mind?

A. When I was admitted to the hospital on February 26th, when I was in the ward the nurse came in and took my blood pressure and she took it and I noticed she looked at it quick, sort of excited, and took it again the second time, and then she took it a third time, and afterwards I asked one of the nurses what my blood pressure was, and I recall somebody telling me that it was [37] 240, and that is the morning I was admitted after having a stroke, and I would like to have that clarified.

Q. Do you know the name of the first nurse?

A. No, I cannot recall.

(Testimony of John B. Piatt.)

Q. Do you know the name of the second nurse?

A. I know who the first nurse was by her voice, but I do not know her name.

Commissioner Gray: Have you an exhibit of the hospital records you want to enter here?

Mr. White: I have the photostatic copies referred to earlier in the record, covering both periods of hospitalization, but the second period only goes through March 27th, on which date the exhibit was prepared, and Mr. Piatt remained in the hospital after that until May 5th.

Commissioner Gray: Will you obtain the complete records and file them?

Mr. White: Yes. I can secure the balance of the records.

Commissioner Gray: Do you want to have this entered now?

Mr. White: Yes, I will enter these as exhibits. These, incidentally, are in duplicates, Mr. Gray. This first set represents the first period, on the admission of December 3d, and the second period covers the admission on February the 26th, 1943.

Commissioner Gray: The Deputy Commissioner has before him Clinical records of The Queen's Hospital, Honolulu, T. H., in [38] case No. 164,272, covering the period of hospitalization from December 3d 1942, in the first entrance, and to December 24, 1942, the first discharge; and from February 26th 1943, on the second admission, and at March 27, 1943, the patient was still in the hospital. If there are no objections those records will be re-

(Testimony of John B. Piatt.)

ceived in evidence and marked Employers' and Carrier's Exhibits A and B. Is there any objection?

Mr. White: No objection.

Claimant: No objection. I would like to have a stipulation, to have you determine from Dr. Cloward what my blood pressure was on or about the entrance to the hospital on the second trip.

Commissioner Gray: They will be marked as exhibits. Photostat copy of hospital record, admittance of December 3, 1942, is marked Employer's & Carrier's Exhibit A. Photostat copy of hospital record, admittance of February 26, 1943, is marked: Employer's & Carrier's Exhibit B.

(Witness excused.)

MRS. FREDA F. PIATT,

called as a witness for the claimant, being duly sworn, testified as follows:

By Commissioner Gray:

Q. State you full name and address to the reporter, please.

A. Mrs. Freda F. Piatt, 646 Wyllie street.

Q. You are the wife of John B. Piatt? [39]

A. I am.

Q. The employee appearing in this case?

A. I am.

Q. You have at all times lived at this address with Mr. Piatt? A. Yes.

(Testimony of Mrs. Freda F. Piatt.)

Q. Were you living with him there on December the 1st 1942? A. Yes, I was.

Q. What was your first knowledge that anything out of the way had happened to Mr. Piatt?

A. On December the 1st he came home around 11 o'clock, and said he had been hit on the head.

Q. How long have you been married?

A. Twenty-five years next July.

Q. Has Mr. Piatt always been a regular worker and provided for the family regularly, without any long periods of illness?

A. Never ill, except with pneumonia.

Q. Specifically, for six months, to December 1942, had Mr. Piatt made any special complaints of feeling funny, or bothered by pains in the head, or a feeling that he should not go out to work for any reason?

A. No, he was always very well; willing to go out and work, but he was tired.

Q. Tired when he came home?

A. Yes, as you do get in this country.

Q. After he got home, after December 1st, 1942, he related [40] the story of having been hit in the head. You have heard him testify as to the sequence of the events that followed, giving the dates and things that occurred, as to going to the hospital and coming from it? A. Yes.

Q. You were aware of all these things, were you?

A. Yes, I was aware of all of them.

Q. Between the two times he was in the hospital he resided here at home, didn't he? A. Yes.

(Testimony of Mrs. Freda F. Piatt.)

Q. He was doing part-time work out in the yard?

A. Yes.

Q. What, if any, were his specific complaints during that interval between his periods in the hospital?

A. As soon as he went to work, or tried to work, after two or three hours work he would get very tired, and the company provided a driver and a car for him, and it saved that much, sir, and immediately he got home,—sometimes at four o'clock, he went to bed and stayed there.

Q. Did he appear to be worried mentally about his condition at the time? Was he worried about his condition?

A. Yes, he wondered what was the matter with his head.

Q. What was the date that here at home something out of the ordinary occurred while Mr. Piatt was in the bathroom?

A. It was on the 26th of February, 1943. [41]

Q. Just what do you know about what happened at that time? What did you say to him, and what did he say to you?

A. Well, I had got up previously and gone in and turned on the electric heat in the bathroom, and I had gone back to bed, for just about five minutes, maybe.

Q. What time of day, about, was this?

A. I would say it was about 6:20, and for some reason,—I don't usually go in the bathroom after

(Testimony of Mrs. Freda F. Piatt.)

he is in there, and I just hollered in and said "Are you ready yet?" and he never made any reply, and I did not hear any noise in there, and I went in to see, and found him on the floor.

Q. Was he unconscious?

A. No, he wasn't unconscious; he could talk.

Q. What did he say to you?

A. He kept saying, "I have to get up and get on the job, go to work."

Q. Did you try to assist him up? A. No.

Q. What position was he in in the bathroom?

A. He had his arm up over the tub, and this one was down (illustrating), and he was trying to raise up.

Q. Was he in a prone position or down on his knees?

A. No, his knees were out on the floor, out here, and his arm was out over here, and he was trying to hold himself up. (Witness illustrates.)

Commissioner Gray: Witness indicates a male figure partially recumbent on the bathroom floor with the right arm partially [42] over the bathtub.

A. I knew by the way he looked that he undoubtedly had had a stroke, and he could not move his leg; he could not move his left leg, and I persuaded him to stay there, and it was warm there, and I had had the electric heat on, and I got blankets too, and got a pillow and put his head on it, and I said "Be quiet" and I went and called Mr. Morgan and Dr. Cloward, and they came shortly afterwards. Mr. Morgan came in about five min-

(Testimony of Mrs. Freda F. Piatt.)

utes, and Dr. Cloward said "Send him to the hospital."

Q. And he was removed to the hospital, was he in an ambulance?

A. Yes, he was removed to the hospital. I kept him on the floor until the ambulance came.

Q. Is there anything else you know about the case that you think would be of pertinent interest?

A. I think it should be brought up that when he went to Dr. Stewart——

Q. Were you present?

A. No,—I am not saying that; I merely want to bring up the fact——

Q. What I am trying to get at is, do you know of anything that you saw or heard of pertinent interest in relation to the case. We have to have that directly from your personal knowledge.

A. It is not seeing or hearing, just merely calling attention to the time. Would that be all right? Here is what I want to bring up. Suppose you hear this, and see if it is all right? [43]

Q. Go ahead and make your statement.

A. It was about 54 hours from the time he had the accident and went to see Dr. Stewart until Dr. Cloward told him to go to the hospital and stay in bed. He was up all that time. Now I think you will find out that in a hit on the head you should be hospitalized, or at least stay flat, immediately.

Q. We will go into that when we get the doctor. Is there anything else, Mrs. Piatt?

(Testimony of Mrs. Freda F. Piatt.)

A. I think that is all.

Mr. White: No cross-examination.

(Witness excused.)

Commissioner Gray: Any other witnesses, Mr. Piatt?

Claimant: I would like to have you question both Mr. Youmans and Commander Potter about my activities, health and ability to do my work prior to the time I got hit in the head, and afterwards.

GEORGE L. YOUMANS

was called as a witness for the claimant, and being duly sworn, testified as follows:

By Commissioner Gray:

Q. State your full name.

A. George L. Youmans.

Q. And your address?

A. 3887 Lurline Drive, Honolulu.

Q. What is your position with the Contractors, P. N. A. B.?

A. I am a member of the operating committee.

[44]

Q. As such, are you in a position to supervise and collaborate with and know of the actions of Mr. John B. Piatt?

A. Yes, Mr. Piatt worked directly under my supervision at all times.

Q. Would you state briefly, for the record, just how this matter was brought first to your attention,

(Testimony of George L. Youmans.)

and anything that you definitely know of the subsequent events?

A. Well, the morning of the accident, the day of the accident, which I understand was December 1st, I did not happen to be in at the time they took Mr. Piatt out of the office. My office is at the other end of the hall, and it is three or four hundred feet away.

Q. Is that on land used and occupied by the United States for military and naval purposes?

A. Yes, right in the Navy Yard proper. Our office manager, Woelfert, came into my office, knowing that Mr. Piatt worked under my direction, and asked me if I had heard about Jack being hurt, and I said no, I had not, and he said "Well, the shade dropped off and hit him on the head, the shade that was over his desk," and so I asked him what had happened to Mr. Piatt after that, and they said he was over in the first-aid station across on the road from the office, and by the time I could call the office they had taken Mr. Piatt home. I think I called on Mrs. Piatt that morning, and asked her if she knew anything more about his condition, or had anything developed at [45] that time, and she said no, that he was home then, and lying down, and I told her, I think, for him to stay there until he felt able to come back to work, and Mr. Piatt, of course, in connection with the work there, had sole charge of the procuring of the materials for the Construction Battalion, and we had put him into that position because he had done similar work

(Testimony of George L. Youmans.)

for a job we had had in one of the outlying islands prior to the war, and about that time the Construction Battalions were getting started, and there was work coming in, and there was a great deal of confusion, more or less, as to how we were going to operate to procure materials for them, and without Mr. Piatt being there it left us in kind of a bad hole, although he had several assistants that could probably carry on, so naturally we were interested in knowing the extent of the injury, and all that was taking place, and in getting him in first-class condition and back on the work as fast as possible, however, not knowing about the medical end of it, and we had just acquired the knowledge he could come back in a day or two days, as I remember, and after that he did come back to work, and he had a conference with Commander Potter, who was in charge of the Construction Battalion here at that time, and Commander Keim, I believe, who was the Public Works officer, and he came into my office the day he came back to work after the accident, and told me, I think about 12 or 1 o'clock, that he could not stand to be here any longer, he had to get back home, and I [46] told him all right, go back, and to stay until he did feel good; until he felt better.

Q. You inferred it was a physical condition that resulted from the injury of December 1st?

A. Of December 1st. And then I kept in touch by telephone, and by talking to Mr. Morgan, who

(Testimony of George L. Youmans.)

worked with Mr. Piatt, after he had gone to the hospital, and kept track of him and how he was getting along, and how soon we could expect him back, and I believe he came back sometime in the early part of January and came in and saw me at that time, and told me then he thought he could come down maybe three or four hours a day and keep his hand in on things and help the boys where he could, and he would have to go back home after that, and I told him I thought that that would be all right, and that lasted until the latter part of February when the second attack, that he just described, occurred, and since then, of course, he has not returned to his work.

,Q. This work to which Mr. Piatt returned, would you consider it, in your opinion, simply that of an ill man getting up and attempting to help out, to keep the program running, and to fulfill the duties in part that he previously had been assigned to?

A. Yes, I would, because on this kind of a job, the man on the job,—who had charge of it, it is something that a man carries a great deal of the things in his head that nobody knows [47] very much about excepting him, and it involves a knowledge of the work on the outlying islands, and getting stuff out to the islands, and things change in five minutes, with ships coming in and out, and a man in Mr. Piatt's position would be the only one to know when those things happen, and without a key man like he is you are pretty much lost in that end of it.

(Testimony of George L. Youmans.)

Q. You have observed thousands of men at work, haven't you? A. Yes, quite a few.

Q. Would you say in your opinion you are pretty well qualified to judge whether a man is working under a physical handicap or not?

A. I think so.

Q. Do you consider that during the time that Mr. Piatt worked that he was laboring under a physical, and perhaps mental, handicap, as a result of his injury?

A. I would, very much so. Several times when he came in and tell me some of his troubles, I would say "Sit down, keep quiet, and don't try to talk too much about these things." I knew he was under mental stress.

Commissioner Gray: Any questions, Mr. White?

Mr. White: No cross-examination.

(Witness excused.)

COMMANDER HOWARD PRATT POTTER, U. S. N. R.

was called as a witness for the Claimant, and being duly sworn testified as follows: [48]

Direct

By Commissioner Gray:

Q. Will you kindly state your full name, rank and address to the reporter, please.

A. Howard Pratt Potter, Commander, Civil Engineers' Corps, United States Naval Reserve.

(Testimony of Com. Howard Pratt Potter.)

Q. You were stationed on this island about December 1st 1942, were you?

A. I was, sir. I have been here since June, 1942.

Q. Commander, will you state briefly, for the record, just what you know; saw or heard, in relation to the events testified about by Mr. Piatt?

A. Mr. Gray, could I make one statement to show my connection with Mr. Piatt, and my work; I think that would shorten it up?

Q. Just go right ahead and make your own statement.

A. I first arrived on the islands as officer in charge of the 5th Construction Battalion, and as Mr. Piatt was the man in charge of the procurement for the construction battalions, practically all my contact with the P.N.A.B. was through Mr. Piatt, and a few months after I was here I was made regimental commander of three battalions, and which grew to 11 battalions, and during that time my contact with Mr. Piatt was increasing more and more. Now, I think,—doesn't that show the connection with Mr. Piatt?

Q. Yes. With such contacts over this period of time, would you say it would call for the action of a vigorous, healthy man in [49] carrying out the duties such as Mr. Piatt was performing, in your opinion? A. It would, sir.

Q. Go ahead, Commander.

A. During this time I expect I have been in telephone communcation with Mr. Piatt at least four or five times daily, and perhaps a conference

(Testimony of Com. Howard Pratt Potter.)

in the morning and a conference in the afternoon, either in his office or in my office.

Q. Did he ever present an appearance or show evidence of outward, untoward fatigue during the period prior to December 1st 1942, in your knowledge?

A. As far as our contacts were concerned, he did not. In fact I was awfully surprised at his seemingly limitless energy.

Q. Now to come down to December 1st, were you in the vicinity of the Contractors' office on December 1st 1942?

A. On that date,—my office is at Red Hill, and I expect four miles from the Yard, and my first knowledge of the accident was when I called in to ask him something on some job, and some girl in the office told me that he had had an accident and had gone home.

Q. Then you did not see the accident?

A. No, I did not see the accident.

Q. And you were not there immediately afterwards?

A. I did not see Mr. Piatt until the morning of the conference with Commander Keim and Alcott in Mr. Piatt's office. [50]

Q. During that conference did Mr. Piatt evidence signs of fatigue and tiredness and mental anxiety? A. Very much so, Mr. Gray.

Q. Did you have to break up the conference earlier than you might otherwise have done on that occasion?

(Testimony of Com. Howard Pratt Potter.)

A. Yes, we did. I did not nearly cover the territory or the ground of this conference as planned, because we could see that Mr. Piatt was in distress, and I thought at the time that his memory was not in such shape, or his physical condition was in such shape, that the Conference really had no particular value.

Q. In other words, compared with the mental alertness exhibited by him on many previous occasions prior to December 1st 1942 he on this occasion presented a less fitness?

A. To a very marked degree, yes, sir.

Q. And did he complain, make any verbal complaints, that you heard, at the time of this conference?

A. He made no verbal complaints, but I noticed he would pick his head several times.

Commissioner Gray: The witness designates Mr. Piatt's having placed his right hand up in the region of the forehead, as if it were hurting him, and as if he were tired.

A. And his evidence of stress made us all unconsciously close the conference as soon as possible.

Q. Is that about the limit of your knowledge?

A. I think it is, yes, sir. [51]

Q. Do you have any other knowledge of Mr. Piatt's disability?

A. I naturally was curious about the accident, and I got that information second or third hand, through Mr. Morgan and through people in the operating base, and I called here at the house sev-

(Testimony of Com. Howard Pratt Potter.)

eral times in person and by 'phone to check on his condition. In fact, I sometimes felt guilty because there were decisions to be made that I could not make without some assistance from him.

Commissioner Gray: Have you any questions you would like to ask the Commander?

Mr. White: Yes.

By Mr. White:

Q. On the day of the conference you speak of, Commander, did Mr. Piatt ask that the conference be concluded, or was that done voluntarily by you?

A. I think it was done voluntarily by all of us. We saw that he was in distress.

Q. Is there anything significant about your contracts with him after he came back to the office for a short period in January?

A. Yes, I think there is. The difference in his grasp of the situation, and on the plans and specifications,—I would like to explain that a little in detail if I could, sir.

Commissioner Gray: Go right ahead.

A. These construction battalions came out in increasing number. We have been taking over the work of the civilian [52] employees, and the question of procurement and organization has become a very large problem. It has reached the stage where Mr. Piatt had been (not officially) selected to head up that group, and he and I were working on an organization in which our offices would be in the same building, and our files would be correlated

(Testimony of Com. Howard Pratt Potter.)

and our operations practically one operation, and that organization had everybody's approval, and mine, and Captain Hartung's, my senior officer, was very well satisfied with the arrangement.

Q. Is that the captain in charge of the Public Works, or the individual?

A. The District Public Works officer, yes, sir.

Q. And after Mr. Piatt's return to the office, what did you observe?

A. After Mr. Piatt's accident there was such a change, oh, in his grasp, for one thing; his grasp of the situation, and his memory of all the details, and it was such that opposition came up to his appointment to that job.

Commissioner Gray: Q. Wouldn't you prefer to say, Commander, that it became necessary to reconsider?

A. Yes, "opposition" is a poor word.

Q. To reconsider his qualifications; apparently they had deteriorated on account of the disability?

A. Yes, I would put it that way. The thing that stands out, in my associations with Mr. Piatt, is his keen memory on detail, and his office seemed to be the one everybody turned to when [53] they could not get the answer any place else.

Q. That condition has changed since December 1st 1942?

A. Yes, it has changed since that time.

Q. In your opinion, from observation?

A. It has very much, sir. My work has increased 10-fold, or my associates, rather. I think,

(Testimony of Com. Howard Pratt Potter.)

Mr. Gray, that the big consideration from my viewpoint, is Mr. Piatt's experience in the outlying islands, his memory of things months back, say of particular parts for an engine that somebody needed, he could tell me where they were, and under what conditions they were bought, and when he same back the second time I would ask him these things and he would say "I should know that, I have some remembrance," but he would shake his head and say "I cannot give you the details."

Q. Now, Commander, in the course of your naval career you, of course, have handled thousands of men?

A. I would not say "thousands" but I have handled a lot of men in the Navy and in my own business.

Q. In fairness to all parties, would you consider yourself more like an expert in determining whether a man being observed by you was physically and mentally capable of carrying on his work, or to the contrary? A. I think I would, sir.

Q. And your statements, as related to Mr. Piatt's case, are based on such expert knowledge, are they not?

A. Yes, sir, and ample time to have had association with him, for several months prior to his accident, and to know his [54] capabilities.

Q. In other words, you feel you are a little better qualified to pass on his personality change from a layman's standpoint than somebody whom you had only seen casually? A. Yes.

(Testimony of Com. Howard Pratt Potter.)

Mr. White: No questions.

(Witness excused.)

(A five-minute recess was here taken.)

MR. ARDEN WALTER MORGAN

was called as a witness for the Claimant, and being duly sworn testified as follows:

By Commissioner Gray:

Q. Will you state your name and address.

A. Arden Walter Morgan, 2982 Kuhio Avenue, Honolulu.

Q. Are you an employee of the Pacific Naval Air Bases? A. Yes, sir.

Q. Were you such an employee on or about December 1st 1942? A. I was.

Q. Where are your offices situated?

A. Inside of the Pearl Harbor Navy Yard.

Q. Are they in close proximity to the offices occupied by Mr. Piatt?

A. They were in the same building.

Q. Are you associated with him in his work?

A. Yes, sir, I was his principal assistant.

Q. Please state for the record just what you saw and heard in [55] connection with any untoward event that happened on or about December 1st 1942, in which Mr. Piatt was involved.

A. I was called to his office by one of his girls, about,—the time I don't know, the exact time, that

(Testimony of Arden Walter Morgan.)

morning, and this girl called my office on the 'phone and I went right down and walked in the door and this light globe was scattered all over the floor, and Mr. Piatt was then,—he was sitting down at that time, and he was quite dazed, and then the other girl, who was down there in his office, was taking some requisitions down from my office, and told me what had happened.

Q. What was the name of that young lady?

A. Miss Jenuwin.

Q. Go ahead and relate what the young lady said.

A. She told me that she brought the requisition in for him to sign, and she had just gotten into the door and was about to take them to his desk, they were various orders, when this light globe fell.

Q. Where was the light globe situated as to where he was seated?

A. It was on the ceiling right above where he sat at his desk, sir.

Q. Are you an engineer by profession, sir?

A. Yes.

Q. Could you closely approximate the distance that the globe would be above the head of Mr. Piatt; from the height he would be sitting at the desk in that office?

A. The height of the ceiling is approximately ten feet, within [56] two or three inches of that, and the light globe is the type that you find right against,—fitting right against the ceiling, and it does not hang down on a chandelier.

(Testimony of Arden Walter Morgan.)

Q. Then what would you estimate the length of fall of the globe to be, approximately?

A. About, between,—six feet, at least.

Q. Did you bring a globe of similar dimensions and weight with you to this hearing?

A. Yes, I brought one that was identical with this.

Q. Will you bring it over here, please.

A. (Witness produces a globe.)

Q. Have you weighed that globe?

A. I haven't myself, but an assistant in my office has taken the weight.

Q. Do you have a slip there on which the weight is recorded? A. Yes, given to me by him.

Q. What is the weight recorded?

A. Three and one-quarter pounds, but how accurate those scales are I do not know.

Commissioner Gray: The witness testifies about, and displays a glass composition, indirect lighting globe, slightly rounded on the bottom, and weighing approximately 3¼ pounds.

Q. Is this a similar type of a globe that is in place as part of the fixtures of the office at which Mr. Piatt was working on December 1st 1942?

A. Yes, that is identical with the one that fell.

[57]

Q. Then what else did you find out about the occurrence?

A. I have the exact height of that ceiling. Do you want that before I go on?

(Testimony of Arden Walter Morgan.)

Commissioner Gray: Any objections to him reading that into the record?

By Mr. White:

Q. Did you make the measurement yourself?

A. My assistant did. I did not make that myself.

Q. Who is your assistant?

A. Dwight Savage.

Q. Was that in connection with the request made by Mr. Woelfert for measurements?

A. Yes, I knew he had made a request, and our office gave him that information.

Q. Do you know whether Mr. Woelfert posed as Mr. Piatt, or as the man sitting in the chair at the desk?

A. No, I was not present when those measurements were taken.

By Commissioner Gray:

Q. What was the measurement of the room, according to this, as made by your assistant?

A. 118 inches was the total height.

Q. That would be nine feet and over.

A. Nine feet ten inches.

Commissioner Gray: Any objection?

Mr. White: No, I think that is all right. [58]

Q. Go ahead and read any other figures you have got. A. That is all the figures I have.

Q. Go on with your narration of anything you saw or heard about the occurrence.

A. After being called down to the office there and finding out what had happened, we took Mr.

(Testimony of Arden Walter Morgan.)

Piatt across the street to the First Aid station, and I do not recall who helped me. There were two of us, and several people were around there, and in the excitement I do not know who did help me, but I know it was raining, and I know we carried his raincoat and his glasses, and we carried his raincoat and glasses across the street, and attempted to throw the coat over his shoulder as we were going, and he was able to walk at that time across the street, with our help; he had an arm around me, around my shoulder, and one around another man's shoulder, and we took him over there, where they had him lie down on the bed.

Q. About what distance would that be from the office to the dispensary, please?

A. I would imagine it would be about three or four hundred feet.

Q. That is an approximation?

A. Yes, that is only a guess of how far it was; three or four hundred feet. After he had been over there for some little time they apparently had called Dr. Stewart or made arrangements to take him down to Dr. Stewart, and Dwight Savage took Mr. Piatt's car, and that was the car that was assigned to him out [59] there, and took him down to the doctor.

Q. To get back to the dispensary, was he given any first-aid treatment while he was there?

A. I don't know what the treatment was.

Q. Did you notice any lacerations on his head?

(Testimony of Arden Walter Morgan.)

A. Yes, there was one, a short cut, but it was bleeding quite a lot, bleeding quite a little, and was running from here. (Indicating.)

Commissioner Gray: The witness makes a point about one inch above the center of the hair-line in the center of the forehead.

A. That's right, it was about there.

Q. From a layman's viewpoint, did you infer that Mr. Piatt appeared dazed at the time you took him in to the first-aid station?

A. Very much so. He is a very heavy man, and he rolled several times in walking across the street, or he reeled, on the way across (indicating), as we were helping him across.

Q. You mean he shifted the burden of his weight from you to the other man and back?

A. Yes, he shifted his weight, one moment one way and the next the other. We had quite a bit of difficulty with him.

Q. He sort of staggered?

A. Yes, he staggered very much.

Q. After that, you left? [60]

A. When I took him into the doctor's office, that was the last I knew of it at that time, until I came here to the house. I am not sure when that was, whether it was that evening or the next morning, after work; I believe it was that evening, I stopped at the house, and he stated to me then that he had been told to stay quiet for a day or so. And he did not come back to work the following day, and the

(Testimony of Arden Walter Morgan.)

first day he was back to work was when this conference was called, the second day.

Q. In the course of your work do you have occasion to view the physical characteristics of a great many workmen out there?

A. Not a great many, but some.

Q. Well, you are in the office, are you not?

A. Yes.

Q. And you have a good deal to do with the personnel, the people coming in and out?

A. That's right.

Q. On the basis of that fact what would be your opinion as to Mr. Piatt's mental and physical vigorousness prior to December 1st 1942?

A. Prior to?

Q. Yes.

A. I never worked for a man or with a man who showed any more tremendous energy.

Q. How long have you worked with him?

A. Since September 1st, I believe; September 1st, I started there. [61]

Q. 1942?

A. 1942. I was moved into his office.

Q. So you were very closely associated with him during all that period of three months?

A. Yes, almost continually, continual association with him all of that time.

Q. And what, if any, difference was there in his general appearance and actions after December 1st as compared with his actions prior to December first, that you observed?

(Testimony of Arden Walter Morgan.)

A. Well, after December 1st, of course I had very little contact with him, except when he came back to the office there and was taken to the hospital, and I was in to see him a few times in the hospital, and I had very little contact until he came back to work in the early part of January, and at that time he was not the same as he had been before; he was not as sharp in his work, and he tired very easily, and all of that time that he was back we tried to consult him only to be advised of what to do; we were in a spot, and we needed his knowledge, to be advised,—in an advisory capacity, and I even took over myself all the signing of routine paper work, and signing his name.

Q. In other words, from what you learned from observation, did you infer that there had been quite a distinct personality change in the man following his injury as compared with that that existed before the injury? [62]

A. Not so much of a personality change, with the exception of his nervousness and flightiness, but there was a very decided change in that way, and about very little things. He was a man that was able to carry a good many things in his mind and handle them efficiently, and little things, and very few of them, did him right up and he became very tired.

Q. You are now referring to the particular period before December 1st 1942?

A. No, I am referring to the time after that. May I amend that? Before that time he was able

(Testimony of Arden Walter Morgan.)

to carry a good many things in his mind, and the detail did not bother him, no matter how much he had to take care of, but after his accident, when he came back there, then why if we had much detail to go over, after he came back, he became very nervous and very tired, and was unable to go on.

Q. You mean he appeared to become very tired?

A. Yes, appeared.

By Mr. White:

Q. When you say he appeared tired, Mr. Morgan, was that your conclusion or did Mr. Piatt communicate that to you in the form of a statement, or what? A. Yes, sir, at times.

Q. What trouble did he complain of when he first came back to work?

A. The only thing that he would mention to me was getting tired, [63] and of headaches, continual headaches; he didn't mention it very much, it was more in his attitude and in the way he handled his work, and my own conclusion.

Q. You were aware of the fact that he had been away from work some forty days and there were a good many things he had missed during that time, and with which he had to acquaint himself, or on that, again, did you single out the more important things? A. Only the more important things.

Q. On which to consult him?

A. Yes, the detail I never did go into. We tried to bother him as little as possible on the detail, and on the more important things we did try to keep him informed about.

(Testimony of Arden Walter Morgan.)

Q. You estimated, the original estimate you made on the height of the room was ten feet, and then you produced a measurement that comes to nine feet—— A. Nine feet ten inches.

Q. How far below the ceiling surface would you say that the globe *depended;* was it a chain fixture or a flush fixture?

Commissioner Gray: The witness has already testified to the fact that this globe was in a fixture directly attached to the ceiling.

Q. How far below the ceiling level was the bottom of the globe?

A. That would only be a guess. It would be,—I don't believe it would be over a few inches. It was sitting very close to the ceiling. [64]

Q. If you were informed that the base of the globe was approximately,—about, approximately 46 or 48 inches above the head of the man seated in the chair beneath it, would you disagree with that figure, seriously?

A. No, I could not, unless I made the measurements myself. I would think however that it would be a little further than that, but I may be in error.

Commissioner Gray: Have you anything in that respect?

Mr. White: Mr. Woelfert did have such a measurement made, and if I understood it right, his statement to me was it was 46 inches.

Commissioner Gray: Do you want to produce Mr. Woelfert?

(Testimony of Arden Walter Morgan.)

Mr. White: I would be perfectly content to have Mr. Morgan make the measurement himself, if he would like to, and submit it in the form of a letter.

Commissioner Gray (To claimant): How tall are you, sir?

Claimant: I am about five feet eleven and one-half inches.

Commissioner Gray (To witness): Would you be kind enough to agree to find some man five feet eleven and one-half inches and have him sit in that chair, and Mr. White, would you have any objection; would you agree to let him take the measurement, and have him sit there and make the measurement from the center, from his head, to the bottom of the globe, it being understood that the globe will be similar to the one that was there on December 1st 1943?

Mr. White: I will agree. The reason for that is [65] that somewhere in the hospital record the distance is described as 12 feet, and I think in another place it is stated as eight or nine feet.

Commissioner Gray: Do you have any objection to such observations being taken for the record, Mr. Piatt?

Claimant: None whatever. May I add this: When I went back in January I measured that myself, and I had one of those flexible steel rods, and I got it as good as I could, and one side of the wall was 11 feet, and I made a measurement of myself sitting in the chair; at the top of the head,

(Testimony of Arden Walter Morgan.)

I got a net difference of about six feet, the same as Mr. Morgan, who spoke about the six foot fall.

Commissioner Gray: Perhaps it would be well for Mr. Morgan to do that in Mr. Piatt's office.

Witness: May I go a little further in that, and certify all of those dimensions?

Commissioner Gray: We will be very glad if you did. We would like to get at the facts.

Witness: I would like to verify all of these figures I have given.

Commissioner Gray: For convenience sake, you can send that to Mr. White, and we will get it.

You have no objection to those figures being entered as exhibits in the case, as an appendix to the record?

Claimant: None whatever [66]

Commissioner Gray: And you have no objection?

Mr. White: None.

(Witness excused.)

Commissioner Gray: Is there anything further?

Claimant: There were several items I was going to have Mrs. Piatt bring out, if she remembered, and I would like to have you put her back on the stand.

Commissioner Gray: The witness will take the chair, and is reminded that she is still under oath.

MRS. FREDA F. PIATT

recalled as a witness for the claimant, being reminded that she was still under oath, testified as follows:

Claimant: Freda, I wanted you to bring out the point about my first visit to the hospital, in December; what happened, the reaction when they first sat me up in the chair?

A. Well, they told me that they thought he could go home in fourteen days after he arrived there.

By Commissioner Gray:

Q. Let's get this down to dates and places. What date was this?

A. It was about nine days after he was in there, and if he was put in on the 3d of December it would be about the 12th of December.

Q. About the 12th. And you visited your husband in the hospital at that time, is that true?

A. Yes.

Q. Was he a bed patient? [67] A. Yes.

Q. And you inquired as to the possibility of his being returned home? A. Yes.

Q. And then what did they tell you?

A. They said that he could probably go home on or about the 14th day.

Q. Who made that statement, do you recall?

A. The doctor.

Q. What doctor?

A. Dr. Cloward. And they were figuring on

(Testimony of Mrs. Freda F. Piatt.)

him getting up on about the 11th day, and then a couple of days later he could go home with me.

Q. Did they allow him to get up on this particular day?

A. He sat up on that day, and it gave him a temperature of 101 and something.

Q. Who recorded that temperature?

A. The nurse. That will probably be in the record.

Q. Was Dr. Cloward present?

A. Not while it was taken.

Q. But was he present when your husband sat up in the chair?

A. I don't think so, but it was by his orders, and he stayed up about five or ten minutes, and started to get chilled, and they put him back in bed, and when his temperature rose the doctor said "no, we will put you down flat again," and they put him clear down flat, and kept him there until the 26th.

[68]

Q. Was the doctor called into the room?

A. He went in nearly every day.

Q. We are recording the sequence of events, and the statement was made he allowed your husband to sit up, after he had been there a certain number of days, and then he was put back down in bed. Where was the doctor from the time he first visited your husband until the day he instructed him he should stay down in bed; was he present in the room?

(Testimony of Mrs. Freda F. Piatt.)

A. No, he was not present, but the next day he called, which might possibly be the next day, and he gave orders to put him flat.

Q. This later event you just simply heard about; your husband told you?

A. I went back and he was flat, and I said "Why?"

Q. Who did you ask?

A. Well, he was asked, and I asked the nurses why, and the doctor why, and at that time the doctor said the blood clot evidently was not eradicated, and they put him down flat for a while longer.

Q. Will you repeat that statement again.

A. He said it might not have been eradicated, but "dissolved," I think, is the word he used; that the blood clot had not been dissolved.

Q. Who made that remark?

A. Dr. Cloward.

Q. And that was in the presence of yourself and your husband? [69]

A. Yes. And so they will put him down flat again, and they started bringing him up after four or five days, the same as they had before, and when they sat him up again one day he could come home, and he stayed a week longer than they had intended him to in the first place, and they were figuring on him coming home earlier.

Q. We appreciate your concern, but I am afraid we will have to bring out the proof on this from

(Testimony of Mrs. Freda F. Piatt.)

the hospital records and on Dr. Cloward's testimony, otherwise the other interested party could object to it being entered.

A. I was merely trying to bring out the fact that he was there longer than they expected him to be.

By Mr. White:

Q. These conversations with the nurses and with Dr. Cloward, they all concerned the time of about December 12th and 13th? A. Yes.

Q. This sitting up one day and your finding him lying back in bed on the following day?

A. Yes, they put him down flat again on the following day.

Q. Yes, and after which you discussed certain matters with Dr. Cloward?

A. Yes, and they said he could not come home, and he had to go back to being flat until the blood clot was dissolved.

Q. Are you certain that Dr. Cloward used the words "blood clot"?

A. I am practically certain he said that the blood clot was not dissolved. [70]

Q. Do you know from anything in your conversation to what bloodclot he was referring?

A. To some kind of a,—as I understood, some kind of a blood clot on the inside of his head, that is caused by practically any hit on the head.

Q. That was your understanding from talking to Dr. Cloward? A. Yes.

(Testimony of Mrs. Freda F. Piatt.)

Mr. White: I think that is all.

(Witness excused.)

Commissioner Gray: I think that what Mrs. Piatt has in mind is this; that even though he should not be present during Dr. Cloward's testimony, he would like to have him interrogated on that line.

For the record, the Deputy Commissioner will state that subject to his limited qualifications he will attempt to bring out all medical facts pertinent to the case, both pro and con, for and against you, and as I said before, to do so in an effort to get every fact on which we can consider the case. Now if you desire that the hearing be held here, and Dr. Cloward can come here, we will be glad to have the hearing here, but you have to realize that these doctors are terribly busy men these days, and in order to get these cases attended to with some despatch we have to favor them somewhat; they are fatigued and tired, and they are doing this in their off moments, when they are not working. Now in the event we cannot get Dr. Cloward to [71] appear at your home, are you willing to waive your personal appearance at a further hearing, in order that we can record Dr. Cloward's testimony?

Claimant: Certainly.

Commissioner Gray: It is your right to agree, or not to agree.

Claimant: Yes.

Commissioner Gray: What is your position?

Claimant: Yes, I will give a waiver.

(At this point an off-the-record discussion was held by all interested parties.)

Commissioner Gray: (To reporter) Make a note that the discussion was relative to the general conduct of the handling of this claim.

Mr. White, do you agree with the Deputy Commissioner that the claimant in this case has been more or less under medical observation for diagnostic purposes until the present time?

Mr. White: When Mr. Piatt returned to the hospital, on February 26th, I think, he was immediately notified both by Mr. Woelfert and also by the hospital; a representative of the hospital having inquired as to whether or not we were to stand the cost of the hospital confinement, that I agreed to assume the hospital expenses pending the making of a diagnosis or the arrival at a definite conclusion as to what relationship the [72] cause for the second confinement had to the accident of December the 1st. In that way we have paid all the hospital expenses throughout the second period. Dr. Cloward has made a fairly definite commitment with respect to the cause of relationship, which I have referred to, but I do not think that they are wholly satisfactory either from our point-of-view or from, certainly, Mr. Piatt's point-of-view, in view of the questions he has asked me personally, and the questions that were put in the record here.

Commissioner Gray: It is your feeling to have

a further medical examination in view; of probing into the situation, with a view of determining the conditions?

Mr. White: My personal feeling is this, after having contacted other people in whom I have a good deal of confidence, that we have not exhausted all of the avenues of research. For example, I think one thing that sticks in my mind as a layman is the fact that no X-ray has ever been made. Dr. Steward did not take any, and I could not find, in the hospital charges, where the hospital made one.

Claimant: There never was any taken. Dr. Cloward said he was going to, but he never did.

Mr. White: The working diagnosis in this case at present is cerebral thrombosis, which Dr. Cloward, in effect says is the result of high blood pressure, and to some extent arteriosclerosis, and which he feels has no relationship, either [73] in actual effect or in time chronology to the accident of December the 1st. In other words, it is a sort of accident, or stroke, which a man of Mr. Piatt's age is exposed to as a natural hazard of life. We cannot disregard either the immediate effect of the accident of December the 1st, and the ensuing disability.

Commissioner Gray: Have you paid Mr. Piatt any compensation yet?

Mr. White: No, and simply for the reason that I had to inform him, frankly, within a week or so after he went back to the hospital, that Dr. Cloward had informed me that he did not see any relationship between the two. On the other hand I did tell Mrs. Piatt, and I think she in turn told Mr. Piatt

that we would mark-time pending the investigation of the matter. For that reason, I think that we feel disposed to pay compensation from February the 26th until such time as a definite medical conclusion can be reached.

Commissioner Gray: I believe that the Carrier's representative's statement in this last respect is well founded, in view of the presumptions contained in Clause 20 of the Act, wherein it says that in any proceedings for enforcement of a claim for compensation under this Act it shall be presumed, in the absence of substantial evidence to the contrary, that the claim comes within the provisions of the act, and that sufficient notice was given, and so forth. I think until such [74] time as we do exhaust the medical possibilities that there is a reasonable inference here that the man is entitled to a replacement of part of his wages in the form of compensation; the period of disability will be considered more or less only for diagnostic purposes until we can get something definite. I think your statement in that respect is highly laudable, and it certainly is acceptable to the Commissioner.

Mr. White: I wonder if I could ask Mr. Piatt one thing?

Commissioner Gray: Yes, certainly.

Mr. White: Q. Mr. Piatt, it is pretty close to the time of your departure, and I do not know that we could work out the medical details here before you leave. In other words, I am no one to say it can be done in three days or four days. That

certainly would be a matter for a doctor to determine, but I am going to suggest to Dr. Cloward that it certainly would not be amiss to have a further examination by himself,—I mean by that a definative examination, in consultation with a physician who has had no prior contact with your case, and is not concerned with you personally, nor with the financial end of the case in any way. If that could be done here in the Queen's Hospital before you leave, would you be willing to go back there for the purpose of that examination?

Claimant: Certainly.

Mr. White: If it, for any reason, cannot be done here without interrupting or interfering with your going to the Coast [75] at an early date, would you have any objection to stopping in, for example, San Francisco, at our expense, well, for the period of the examination? As I say, I can approximate but I cannot guaranty the length of time.

Claimant: How long do you think that would take, approximately?

Mr. White: I should think if you went into the hospital for two or three days they would certainly have ample opportunity to investigate all phases of it.

Commissioner Gray: Providing we got the information to them as soon as we know he is leaving, so that there will be no undue delay.

Claimant: I think that would be proper. I would be perfectly willing. I would probably like to rest a few days there before going north.

Commissioner Gray: If the examination is to be

had in San Francisco the deputy commissioner will forward the papers to Warren Pillsbury, who is located at 417 Market street, and I will suggest to him that at such examination they ask one of the analytical consultants of the Public Health to take part in the examination. in order to expedite maters and attempt to arrive at a definite finding.

Mr. White: I am perfectly agreeable to paying compensation from February 26th until such time as we reach a reasonable medical conclusion, which can be submitted to the [76] Deputy Commissioner for decision on the case as a whole, and in that connection, if the examination should be done in San Francisco, I would consider that Mrs. Piatt, because she is attending you, would also be there at our expense in connection with the examination. In other words, the examination won't cause you any financial loss through the delay there.

Commissioner Gray: For the record purposes, the Deputy Commissioner approves the action contemplated by the Insurance Carrier, as to the liability for compensation involved, as set forth in the preceding statement of Mr. White's, and if there is nothing further to be brought forth at this time we will adjourn until a further hearing to be held at such time as definite medical evidence is brought before the Commission.

I wish to officially inform you that your claim, as the law provides, lives during the period that you are being paid compensation and for one year thereafter; without the filing of any formal claim other than that which you filed. However, if you

change your address you are requested to notify both the insurance carrier and the Commissioner, and it is our recommendation, as you have done heretofore, that you cooperate in any steps that may be taken and assist in straightening out your case. Jurisdiction will be transferred subsequently to the appropriate deputy commissioner of the compensation district nearest to the point where you take up your residence on the mainland. [77]

Claimant: That will be San Francisco.

Commissioner Gray: We will probably transfer it to San Francisco, and subsequently to Mr. Marshall in Seattle, if you move to Oregon.

We will adjourn.

(Hearing concluded)

Territory of Hawaii
City & County of Honolulu—ss.

I, R. N. Linn, an official shorthand reporter of the First Circuit Court of the City and County of Honolulu, Territory of Hawaii, Do Hereby Certify, that the above and foregoing transcript, pages 1 to 66, inclusive, is a full, true and correct transcript of my shorthand notes taken in the within entitled matter, at the time and place aforesaid.

Dated: Honolulu, T. H., this 11th day of June 1943.

. . . . . .

Official Circuit Court
Reporter.

[Endorsed]: Filed Nov. 30, 1944, San Francisco. [78]

Howard C. Naefziger, M.D.
O. W. Jones, Jr., M.D.
Howard A. Brown, M.D.
384 Post Street
San Francisco, U.S.A.

June 23rd, 1943

Liberty Mutual Insurance Company,
Central Tower,
San Francisco, California.

Attention of Mr. Chandler.

Re: Mr. John Piatt.

Dear Mr. Chandler:

The above patient was hospitalized at the Franklin Hospital for observation and study. This patient is 55 years of age, married, and has been occupied as a civil engineer.

The patient states that he was quite well, although he was working very hard, until December 1st, 1942. At that time, a heavy glass chandelier fell and struck him on the vertex of the head. He was sitting in a chair at the time and was thrown forward but was not rendered unconscious. He felt somewhat dazed and sustained a slight scalp laceration. Following this, he had a headache which was troublesome. The patient was put to bed for about twenty-four hours, after which he attempted to resume work. At that time, he felt difficulty in concentrating, was somewhat nauseated, and complained of dizziness.

He was then seen by Dr. Ralph Cloward, of

Honolulu, who hospitalized the patient at that time. On the day of his admission, it was reported to him that his blood-pressure was 240/100. The patient states that that was the first time he had any knowledge of an increase in blood-pressure. He stated that Dr. Bulman, of Santa Rosa, had cared for him with a lobar pneumonia in 1937, and had told him at that time that his health was good. He states that in 1929 he passed a life insurance examination without difficulty. As far as could be determined, he had no definite knowledge of this hypertension prior to the above date.

He was hospitalized for about three weeks, following which he was sent home to bed for a week. During that interval, his blood pressure ranged from 170-190 systolic, according to his statement. He then returned to his work, and was feeling fairly well except for continual headaches, which persisted intermittently, and gave him a sensation of a constricting band over the top of his head to a point between the ears.

On the morning of February 26th, 1943, while shaving, he states, his legs buckled and he fell to the floor. He did not lose consciousness, but was unable to move the left arm and leg and face. His tongue was thick and his speech was very difficult. He states [128] that at that time he had an absolutely complete paralysis, and was unable to move the arm and leg in any way. He was immediately hospitalized under the care of Dr. Cloward, and at that time his blood-pressure was said to have been 200. Prior to this episode, the patient had noted no

difficulty in the use of his arms and legs. There has been a gradual improvement, particularly in the leg, since that time, but the arm has been very slow. He has received physiotherapy and has just now returned to the mainland. He plans to return to his home in Oregon for further convalescence.

In addition to the motor disturbance, there has been some sensory change and numbness, particularly noticeable in the left forearm and hand.

The patient further comments on the fact that he has been under terrific strain for the last three-and-a-half years. Since January, 1940, he has been under contract with the Navy, living and working in Honolulu as a civil engineer, and had directed numerous construction projects, which had demanded a great deal, both mentally and physically, according to his statements.

The patient recalls one other fact, and that is that three our four days before his paralysis appeared, he had had a "few transient spasms" in the left arm, hand and leg, as if the muscles would tighten up momentarily.

Family history: his mother is alive at 81. His father died at 84. No other familial illnesses.

Past History: the patient apparently had convulsions of undetermined origin when he was an infant. No recurrence subsequently. He had the usual childhood illnesses. Gc. in 1907. Pneumonia in 1937. Accidents: he had a multiple fracture of his left arm and forearm in 1899, but made a good recovery. He received a blow to the left elbow in June, 1942, and some numbness of the hand fol-

lowed that, but it cleared completely. Operations: appendectomy in 1909. Sinuses opened in 1917.

Systems: essentially negative.

Weight: average 190-200 lbs. at present about 186 lbs.

Examination: the patient is rather a large, moderately obese man, who seems oriented and rational. He is quite talkative, particularly with regard to his illness.

Head: negative to auscultation, palpation and percussion.

His general physical examination will be covered by Dr. Ernest Falconer, who is examining him at this time. His blood-pressure now is recorded as 188/88. [129]

I. Cranial nerve examination: Subjectively negative.

II. Visual fields and acuity roughly within normal limits. The fundi showed disc margins which were fairly well outlined. There was no evidence of increased pressure. The vessels showed some definite sclerotic changes.

III, IV & VI. Pupils and reactions normal. No extraocular palsies. No ptosis.

V. Motor and sensory negative.

VII. The patient has slight weakness of the left face, of the central type. Subjectively, taste is not disturbed.

VIII. Vestibular and auditory negative.

IX, X, XI & XII. Negative.

Cerebral lobe test: as noted, the patient shows

no disorientation at the present time. He has very little in the way of residual headache at present.

Motor power: the patient has a marked paralysis of the left arm, with very little motion, except in the shoulder girdle, where there is slight motion. He has no real ability to move the forearm or hand. The left leg functions fairly well, and he is able to get about although with some difficulty.

Sensory examination shows some hypesthesia over the left side of the body, most marked in the arm.

The reflexes are all quite hyperactive, the left side greater than the right. No pathological reflexes or cloans at this time.

There is a good deal of spasticity and joint stiffness, and it is impossible to move the fingers or wrist on the left side, very much, because of these factors, plus the pain associated with them.

X-rays of the skull show no sign of any fracture or other pathological change.

The urine shows a slight trace of albumen.

The blood count is within normal limits.

I have reviewed the file submitted, including the reports from Honolulu and the hospital records in this case. I have also discussed the matter at some length with Dr. Falconer, who has examined him from the medical standpoint. [130]

Discussion: this patient originally sustained a blow to the head without loss of consciousness, but with slight laceration of the scalp. He showed no evidence of any brain injury, according to Dr. Clo-

ward's report. There was no evidence of a fracture of the skull.

Following that, the patient had some head discomfort, which would not be unusual, considering his hypertension. However, he reached a point where he was able to return to work, and it was almost three months after the original blow to the head that the patient developed evidence of a definite cerebral vascular accident. I would agree with the previous examining physician that this represented a cerebral thrombosis secondary to his vascular disease and hypertension.

Considering the length of time that elapsed, following the blow to the head, plus the fact that this was a slight injury without evidence of any brain damage, I do not feel that there is any connection between the cerebral vascular accident occurring in February, 1943, and the head blow of December, 1942.

The patient very definitely shows the hypertension and vascular changes which are a causative factor in the cerebral thrombosis, and, in my opinion, this condition would have occurred regardless of whether the patient had a blow to the head in December or not.

Very truly yours,

HOWARD A. BROWN, M.D.

HAB/FM [131]

Howard C. Naeffziger, M.D.
Raymond J. Meitzel, M.D.
384 Post Street
San Francisco
Douglas 3266

June 23, 1943

Liberty Mutual Insurance Company
Central Tower
San Francisco, California

Attention: Mr. Chandler

Re: Mr. John Piatt

Dear Mr. Chandler:

The above patient was seen on June 23, 1943 at the Franklin Hospital in consultation with Dr. Howard Brown. Following is the report of my examination.

Family History: Mother alive and well at 80. Father died at 84. One brother died after abdominal operation. One sister died after appendectomy. One brother alive and well. No asthma, pulmonary tuberculosis, cardiac, renal diabetes, epilepsy or pernicious anemia in family history.

Past History: Born in Minnesota 1880. Had severe convulsions in infancy. Had usual childhood diseases, all mild.

Venereal Diseases: Neisser in 1907, treated by an M. D., no sequelae.

Operations: Appendix removed in 1909. In 1917 sinuses operated on, sphenoids and ethmoids? In 1937 patient had "double pneumonia" at Santa Rosa, was under care of Dr. Bowman.

Accidents: In 1899 had multiple fractures left arm and forearm, elbow joint badly smashed, left arm never regained complete strength. Left elbow injured again in 1942, numbness for one week.

Habits: Usual weight 190-200 lbs., present weight 186. Coffee 1x; tea 1x; drinks alcoholic liquors moderately; smokes 6-8 cigarettes, 1-2 cigars daily. Appetite good. Sleep fair. Nycturia 1x; bowels constipated. Has frequent "colds" usually in head. All teeth removed in 1932.

Complaints: 1. Paralysis, left arm. 2. Headache. 3. Numbness, left forearm and hand, four months' duration.

History of Present Illness: Patient states he was well up until December 1, 1942. He was employed as an engineer in the Hawaiian Islands at this time, and, on that date as he was sitting at his desk, a glass chandelier above him fell and struck him over the vertex of the head. States he was not knocked out but was dazed. Received a scalp wound. Was put to bed for twenty-four hours after which he attempted to return to work. He was unable to concentrate and felt nauseated, also dizzy. Was referred to Dr. R. B. Cloward, a [132] neurological surgeon, who hospitalized patient on December 3, 1942, at Queens Hospital. Patient states that on the day of entering hospital his blood pressure was 240/110. He states this is the first time he knew he had a hypertension. Dr. Bowman, who looked after patient at Santa Rosa when he had pneumonia in 1937, told him at that time

after recovery from the pneumonia that his general health was excellent. (This is patient's version.)

He remained in the hospital for three weeks, then returned home, remaining in bed for one week. During this time his blood pressure ranged from 170 to 190 systolic. Patient resumed work after one week at home and states he felt well except for headaches. On February 26, 1943 while shaving in his bath room, at home, his legs "buckled" under him and he sank to the floor. He did not lose consciousness but could not move left arm and leg. He was immediately hospitalized again at Queens Hospital, Honolulu under Dr. R. B. Cloward. Blood pressure on admission, he states, was 200. Since February he has received physiotherapy and there has been a gradual return of motor power in left arm and leg, the latter returning first.

When patient was confined to the Queens Hospital, Honolulu, after his left hemiplegia, the case record from this hospital shows that he had a left facial paralysis, thick speech, paralysis of left arm, paresis of left leg. Babinski on the left. On February 27, 1943, there was some movement of left arm, and left leg was stronger.

During the first three weeks of his hospitalization he ran a low grade fever reaching as high at 100 F.° at times. He was discharged on March 27, 1943. The urine examination, February 27, 1943, showed a trace of albumin, 8-10 white blood cells and 8-10 red blood cells. The blood count, February 27, 1943, was Hemoglobin 101.3%, red blood cells 4,980,000, white blood cells 8,100, neutrophils

71%, lymphocytes 28%, monocytes 1%. Dr. Cloward's diagnosis on the hospital record was: "Cerebral arteriosclerosis with small thrombosis anterior limb of right internal capsule, involving the anterior lateral nucleus of the thalamus."

Physical Examination: Patient is lying comfortably in bed. He appears somewhat overweight and obese. Face somewhat pale and cyanotic appearing. Hair is brown, oily, medium coarse texture. Scalp shows seborrhoea. Small superficial scar over upper frontal region behind hair line. Skull shows no depressions or tender areas. Eyebrows heavy.

Eyes: There are no ocular muscle palsies. Lower lids show bilateral conjunctivitis. Pupils somewhat irregular in outline, react to light and distance.

Ears: Slight bilateral diminution of hearing.

Nose: Left passage enlarged by previous nasal (septum and turbinate) operation. The mucous membranes of both nasal passages are congested.

Mouth: Lips are cyanotic. Teeth are out in upper and lower jaws, replaced by plates. Tongue is pale, flabby, coated. Tonsil stumps are ragged.

Glandular System: No enlarged nodes made out. The thyroid gland is palpable, the lobes are soft, elastic, no adenomatous nodules felt. [133]

Vessels: The superficial arteries are palpable, somewhat thickened. Radial pulses are equal, synchronous. Blood pressure 190/122.

Heart: The borders of cardiac dullness are slightly increased to the left on percussion. The P.M.I. is not seen but is felt in the 5th and 6th

interspaces 12.5 c.m. from the M.S.L. Over the lower precordium the heart sounds are well heard. The first sound is accentuated. At the base A2 is high pitched and accentuated. No murmurs heard at the base.

Chest: Well developed, well clothed. Emphysematous in type. On percussion the chest is resonant throughout. The breath sounds are roughened over the scapular areas. On coughing and deep breathing no rales or crepitations are made out.

Abdomen: Prominent. Liver edge is palpable at the costal border upper right quadrant. The edge of the liver is slightly tender on palpation. The sigmoid portion of the colon is tender. The abdomen is distended. Spleen and kidneys not felt. No masses. No shifting dullness in flanks.

Extremities: The left elbow joint is deformed from a former accident and operation. There is a scar over the dorsum of the left wrist. Lower extremities show slight edema.

Reflexes: The left facial paralysis has disappeared. Left side of face moves well. The left arm has very little power of movement. He cannot move forearm or hand. The left leg can be moved but is spastic. The deep reflexes are hyperactive, greater on the left than right.

Discussion and Opinion:

This patient sustained a moderately severe head injury on December 1, 1942. There was no loss of consciousness, no skull fracture, no evidence of

any brain injury. He had rather protracted symptoms after the head injury due to his age and the fact that he has cerebral arteriosclerosis and hypertension.

Patient returned to his work, and, almost three months after his head injury, he suffered a thrombosis of a cerebral vessel, diminishing the blood supply to certain centers in the brain that control the muscular movements of face, arm and leg on the left side of the body. Cerebral thrombosis means that a clot forms inside a cerebral vessel. I do not see any possible connection between the formation of this clot inside a cerebral vessel and his head injury nearly three months before.

He has evidence of arteriosclerosis in the fundi of the eyes, also in the kidneys as his urine shows constantly a small trace of albumin.

On account of his hypertension his future is uncertain and he will be a candidate for future trouble of the type he is now suffering.

ERNEST H. FALCONER, M.D.

EHF:rfm [134]

[Title of Commission and Cause.]

COMPENSATION ORDER
AWARD OF COMPENSATION

A claim for compensation having been filed in the Pacific District and a hearing having been held in Honolulu, Territory of Hawaii, before Deputy Commissioner Gray, and the matter having been transferred to this, the Fourteenth Compensation District, by authority of the Commission for such further action as might be indicated, and such further investigation having been made as is considered necessary and no additional hearing having been requested by the parties,

The Deputy Commissioner makes the following

FINDINGS OF FACT:

That on the 1st day of December, 1942, the claimant above named was in the employ of the employer above named at a place within the Pacific District, established under the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as extended by the Act of August 16, 1941, as amended (42 U.S.C., Sec. 1651), to employees of contractors with the United States, and others, employed outside of the United States, and that the liability of the employer for compensation under said Act was insured by the Liberty Mutual Insurance Company;

That on said day claimant herein while performing services for the employer sustained personal injury resulting in his disability while employed

as a procurement agent; that while so employed and working at his desk an electric light reflector shade fell and struck the claimant's head, causing injury and resulting in his disability;

That the employer had knowledge of the said injury; [136]

That the employer furnished claimant with medical treatment, etc. in accordance with section 7 (a) of said Act;

That the average annual earnings of the claimant at the time of said injury were in excess of the maximum provided by the Act;

That as a result of the said injury the claimant was wholly disabled from December 1, 1942, to and including January 10, 1943, and from February 26, 1943, to and including November 18, 1943, and he is entitled to 43 6/7 weeks' compensation at $25.00 per week for such disability or $1,096.43; that on November 19, 1943 the total disability of the claimant resulting from the said injury continued;

That the employer and insurance carrier have paid to the claimant $546.43 as compensation;

Upon the foregoing facts the Deputy Commissioner makes the following

AWARD:

That the employer, Contractors, Pacific Naval Air Bases, and the insurance carrier, Liberty Mutual Insurance Company, shall pay to the claimant compensation as follows: $1,096.43, covering

to and including November 18, 1943; that the employer and insurance carrier shall have credit on this award for $546.43; that subsequent to November 18, 1943 the employer and insurance carrier shall pay compensation to the claimant bi-weekly at the rate of $25.00 per week during the continuance of the said disability; that the total compensation payable under this award shall in no event exceed $7,500.00.

Given under my hand at Seattle, Washington, this 29th day of November, 1943.

WM. A. MARSHALL
Deputy Commissioner, Fourteenth Compensation District. [137]

PROOF OF SERVICE

I hereby certify that a copy of the foregoing compensation order was sent by registered mail to the claimant, the employer and the insurance carrier at the last known address of each as follows:

Mr. John D. Piatt, 176 Lincoln St., Ashland, Ore.

Contractors, Pacific Naval Air Bases, P.O. Box 857, Oakland 4, Calif.

Liberty Mutual Insurance Company, 703 Market St., San Francisco, Calif.

C. F. White, Atty. at law, Honolulu, Territory of Hawaii.

John C. Gray, Deputy Commissioner, U. S. Em-

ployees' Compensation Commission, 407 Hawaiian Trust Bldg., Honolulu, T. H.

WM. A. MARSHALL
Deputy Commissioner.

Mailed November 29, 1943. [138]

CERTIFICATION OF RECORD

Re: Liberty Mutual Insurance Co. vs. Marshall and John B. Piatt, Cause No. 851.

This is to certify that the following are a portion of the record in the above case:

Transcript of record of a continued hearing held before Deputy Commissioner Gray at Honolulu on June 30, 1944, consisting of 28 pages.

Insurance Carrier's Exhibit A, Parts 1 and 2, being photostatic copies of hospital records in this case.

WILLIAM A. MARSHALL
Deputy Commissioner 14th
Compensation District

Seattle, Washington, August 30, 1944.

[Endorsed]: Filed Sep. 6, 1944. [139]

[Title of Commission and Cause.]

TRANSCRIPT OF TESTIMONY

Before John C. Gray, Deputy Commissioner, Pacific District.

Pursuant to oral stipulation, the above entitled matter came on for an adjourned hearing before

John C. Gray, deputy commissioner, United States Employees' Compensation Commission, at Honolulu, T. H., on the 30th day of June, 1943, at 2 p.m.

Appearances:

C. F. White, Resident Manager, Liberty Mutual Insurance Company, on behalf of the respondents.

Reported by: Carey S. Cowart, Certified Shorthand Reporter, Honolulu, Hawaii. [141]

Comm. Gray: This is an adjourned hearing in the case of John Piatt, agreed to by stipulation of the claimant and of the employer and carrier, under public law 208, with respect to certain reports pertaining to the medical attention given by Dr. Cloward. Personal appearance having been waived by the claimant, proceedings came under the purview of public law 208.

Are you ready, Mr. White?

Mr. White: Yes, sir.

Comm. Gray: Dr. Cloward, will you be kind enough to state your name and address to the reporter for the purpose of the record?

Dr. Cloward: Ralph B. Cloward, 388 Young Hotel, Honolulu.

Comm. Gray: Will you kindly rise and be sworn?

RALPH B. CLOWARD, MD,

being first duly sworn, testified as follows:

Comm. Gray: Do you want to qualify the doctor?

Mr. White: Yes.

(Testimony of Ralph B. Cloward, M.D.)

Comm. Gray: I think it may be well under the circumstances.

Mr. White: I was going to ask Dr. Cloward, in view of the absence of the claimant, and patient, if he would be so kind as to state his qualifications of the record. That is, as to your formal education.

A. Doctor of medicine, graduate of Rush Medical College [142] in 1934, with five years post-graduate training in my speciality.

Q. (By Comm. Gray) Which is what, Doctor?

A. Neurology and neuro-surgery.

Q. (By Mr. White) Are you a duly licensed practitioner in the Territory of Hawaii?

A. Licensed by the Territory of Hawaii October, 1938.

Q. Dr. Cloward, will you state whether or not you have ever attended Mr. John B. Piatt.

A. Yes, I have.

Q. Can you state the approximate date and the purpose for which you were called?

A. I have more or less attended Mr. Piatt since the first week in December, 1942. December 3, 1942. This is the hospital record. And my last connection with him was—Do you know when he was discharged from the hospital, his date of discharge?

Q. I believe the record indicates Mr. Piatt was last discharged from the hospital on May 5, 1943.

A. May 5. I haven't examined him since his discharge from the hospital.

Q. Dr. Cloward, will you state for what injury or purpose you were first called to attend him?

(Testimony of Ralph B. Cloward, M.D.)

A. I first saw the patient——

Mr. White. Pardon me. Mr. Gray, will there be any objection to Dr. Cloward refreshing his memory from his own written notes? [143]

Comm. Gray: Not a bit. We have a copy of them. I can get them from the record here, Mr. White, if it is all right. Will you furnish a copy of your reports submitted by Dr. Cloward to the Commission in order that they may be forwarded with the record?

Mr. White: Yes, sir.

A. I first saw the man about an hour after his admission to Queen's Hospital on December 3, 1942.

Q. (By Comm. Gray) You are now referring to the Queen's Hospital reports, are you, Dr. Cloward? A. Yes.

Comm. Gray: Which previously have been inspected.

A. There is no record of my having visited him in this record, but I recall of having examined him about an hour after he was admitted to the hospital.

Q. (By Comm. Gray) The records you are now looking at are records that have been subpoenaed from the Queen's Hospital?

A. I referred to them as the date on which I saw him.

Q. (By Mr. White) Doctor, this is purportedly a copy of the record from which this copy was also made. A. Yes.

Q. It may be a little more convenient for you to have before you. Will you state what his physical

(Testimony of Ralph B. Cloward, M.D.)

condition was at the time you first saw him, what you treated him for?

A. On the first examination the patient was perfectly [144] conscious. He was in an extremely nervous state, trembling, perspiring profusely, and when attempting to talk his voice quivered. And he gave me a history that he has been sitting at his desk when a large chandelier came loose from the ceiling and had fallen, he said, approximately eight to twelve feet, and striking him on top of his head, and the chandelier bursting into a million pieces.

Q. The description of the fallen object as a chandelier was given to you by the patient?

A. Yes. That is what he told me at that time.

Q. I understand you to say that he also gave you the history that it had fallen a distance of—how far?

A. Well, he told me it was approximately eight to ten feet.

Q. Eight to ten feet?

A. As far as he could ascertain.

Q. What evidence of injury did you find, if any, Doctor?

A. On his examination, the most striking thing about his examination was that of extremely high blood pressure, which as I recall was somewhere around 240 or 230 over 140. That initial blood pressure we felt was probably due to primary hypertension that the patient had prior to his injury, although we attributed some of it to the extreme

(Testimony of Ralph B. Cloward, M.D.)

nervous state that he was in on his admission to the hospital.

Examining his head, there was no very extensive wound [145] about his head that would look as though he had been struck by any heavy object. There was no large bump, swelling or bruise or contusion that I could find. The following day, however, there was a small crust found in his scalp from a scratch which he may have got from a cut from glass.

The remainder of his examination was entirely negative, and purely from the story and not the examination of his nervous system we made a tentative diagnosis of concussion of the brain.

Q. You say that was purely from his story, rather than any objective findings?

A. Yes. Diagnosis of concussion very frequently has to be made purely on history rather than findings, because if a concussion of the brain is not severe enough to render a patient unconscious it is usually not severe enough to bring about any other change in the brain that we can demonstrate by our neuro-logical examination.

Q. Doctor, I understand you have to make an examination, however, to determine whether or not there were any objective rather than symptomatic evidences of a concussion?

A. Yes. That is routine procedure in all my head injuries. I go over them carefully from a neurological standpoint to determine what the status of their intercranial damage is, and if we find noth-

(Testimony of Ralph B. Cloward, M.D.)

ing in that examination then our diagnosis is made purely on history. If the patient has been struck and has been dazed for a few minutes and come out of it and has a headache [146] that is sufficient to make a diagnosis of mild concussion of the brain without clinical findings on examination.

Q. Doctor, will you explain for the record what is meant by a blood pressure of 230 over 140?

A. Well, that blood pressure in any individual would be called a primary hypertension. By that we mean that certain changes have to take place in an individual's arteries to bring about changes in the pressure of the blood. That is the force with which the heart beats. We measure blood pressure by the systolic and diastolic measurements, the systolic being the first number, and in this instance was 230. Now an elevation in the systolic pressure can be brought about by emotional changes in the individual, fear, anger, and extreme apprehension, and all elevate the systolic pressure. The diastolic pressure, on the other hand, or the second figure, which on admission was around 130, which normally is between 80 and 100, this pressure is usually dependent on the condition of the peripheral arteries, that is the arteries in the body. Those arteries are normally small and the heart has to push harder to get the blood through the small arteries, and that causes a rise in the diastolic pressure.

Q. Dr. Cloward, assume that Mr. Piatt's approximate age is 54 to 55 years; on the basis of his

(Testimony of Ralph B. Cloward, M.D.)

blood pressure on admission to the hospital on December 3 was his diastolic pressure abnormal?

A. Yes, his diastolic was definitely abnormal, that of [147] 130, whereas the normal diastolic in such an individual would be 80, 90, to 100.

Q. I believe your reference to the record a few months ago indicated diastolic pressure of 140, rather than 130. Is there enough difference——

A. Yes, the diastolic was 140.

Q. On the rule of thumb it should have been approximately 150 to 155?

A. That is the diastolic. The diastolic is 130. That is the second figure. The systolic was 240. I should say the systolic was 230.

Q. (By Comm. Gray) Above the average, is it, Doctor?

A. The normal blood pressure will run 120/80. That is supposed to be considered normal.

Q. Approximately 120 plus his age?

A. They say 100 plus his age. If a man is 54 and he has a blood pressure of 154, that is about normal.

Q. You allow 10 to 15 percent for emotional disturbance or climbing up stairs?

A. It depends entirely on the individual, Mr. Gray. The fluctuation of different individuals' blood pressure varies according to their emotional stability. Some individuals may be extremely emotional and a sudden upset in their emotions may shift their blood pressure 50 or 60 points.

Q. Take the average individual coming into see a doctor. [148] A. Yes.

(Testimony of Ralph B. Cloward, M.D.)

Q. Reducing it down to a quotient, that normal person, ten or fifteen points——

A. Ten or fifteen points, such a normal person, if you put them down on their back and let them rest and relax for ten or fifteen minutes, that ten or fifteen points will drop down to pretty near normal.

Q. (By Mr. White) Dr. Cloward, did Mr. Piatt's blood pressure become normal or anywhere near normal? A. Yes, it did.

Q. Subsequent to the date of his admission?

A. After his admission—I don't see any record of his blood pressure one week after his admission. But ten days or so after he was admitted the nurse reports a blood pressure of 143/80, 160/100, and those pressures——

Q. (By Comm. Gray) Will you try to answer the question, please?

A. Those blood pressure could be expected in a person with a primary hypertension after being flat on his back in bed for a period of a week or ten days.

Q. During the period that he was on his back ten days or twelve days, Dr. Cloward, was he administered certain sedatives? A. Yes, sir.

Q. And other treatment that might tend to reduce the [149] blood pressure to normal?

A. Rest and inactivity are much more important factors in reducing the pressure than drugs or medicines. And keeping him flat on his back and giving him a sedative to sleep well at night, and relieving

(Testimony of Ralph B. Cloward, M.D.)

pain, if any, was all that was done for him and his blood pressure came down to this level. Of course we know external environmental conditions that would change the emotional or let the emotional factor interfere with his blood pressure.

Comm. Gray: Mr. White, do you object if I ask another question, with intent to bring out the facts?

Mr. White: I would like to finish my direct examination.

Comm. Gray: Go right ahead. I hope you can shorten this because the Doctor, I know, is a very busy man.

A. That is all right. Take all the time you need. I have my case scheduled for four o'clock.

Q. (By Mr. White) Doctor, I notice that on the first few days of treatment in the hospital Mr. Piatt was apparently administered membutal.

A. Yes.

Q. What was the purpose of that medication?

A. The membutal is usually administered chiefly for sleep, and with patients as extremely nervous and apprehensive as Mr. Piatt was on his admission to the hospital initial orders [150] on the date of admission included one capsule of membutal to be given at night for sleep and repeated once if necessary, that is, if he couldn't sleep.

Q. The intention of that drug was simply to put the patient at ease so that he could get his rest?

A. Yes, and sleep at night.

Comm. Gray: Incidentally, are we talking about the first visit of Mr. Piatt?

(Testimony of Ralph B. Cloward, M.D.)

Mr. White: This is all at the first visit in December.

Comm. Gray: Let it be understood we are now discussing the first visit of the patient to the hospital under the attention of Dr. Cloward.

Q. (By Mr. White) Incidentally, Dr. Cloward, how long was the patient in the hospital on the occasion of his first period of hospitalization?

A. From December 3 to December 24; that is 21 days or 3 weeks.

Q. After his admission to the hospital did any abnormal development occur?

A. No, nothing whatsoever. As I recall, he complained of mild headache for the first few days, after which his symptoms disappeared. He still showed signs of apprehension and nervousness, but if I recall right at the end of a week or ten days he was quite anxious to go home. [151]

Q. Was there at any time an elevation in his temperature such as to produce unusual complaint?

A. For the first two weeks.

Q. (By Comm. Gray) What was the reason that he was discharged by ambulance, Doctor, when he left the hospital the first time?

A. Was he? I didn't recall, Mr. Gray, that he was discharged by ambulance.

Q. That is what the record shows.

A. Oh, yes. That is right. "Home by ambulance." I don't remember specifically. It was not on my order. It was probably on the patient's request.

(Testimony of Ralph B. Cloward, M.D.)

Q. In the face of his being discharged by ambulance would you consider that he had fully recovered from the effect of his claimed injury?

A. Well, we very frequently send patients home by ambulance that are completely well, if they have no other means of transportation.

Q. In other words, is that a matter of meeting the whims of the patient?

A. That is right. It wasn't that I felt his condition was such that he had to go home by ambulance. As a matter of fact, I was ready to discharge him at the end of the two weeks period and we kept him in the hospital an additional week at his request. I think we let him sit up about the twelfth or thir- [152] teenth day after his admission, and then he developed an infection in one of his fingers and ran a little fever with this infection.

Q. Was it the finger or the back, Doctor? Didn't you take a biopcy, a little speciman from his back?

A. Yes. He had a little skin tag on his back and he asked me if I would clip it off for him, and I clipped that off one day. He had an infection in his finger, which I thought perhaps was the cause of this elevation in temperature and we had that finger wrapped up and dressed with some alcohol and glycerin, I think, something of the sort, on the thirteenth.

Q. Would you consider that a side issue, more or less coincidental to the treatment of any patient that might be worrying about a lot of trouble?

(Testimony of Ralph B. Cloward, M.D.)

A. Yes, but the generalized influence that this minor infection and rise in temperature had on the man was all out of proportion to the seriousness of the condition, which we passed off as being due to the man's particular personality. That is, he got this little rise in temperature, he became chilly and perspiring, and then along with it he became extremely nervous, shaky and jittery, and he couldn't stand to have anybody touch him and he hollered and yelled at the nurses and carried on like that for two or three days.

Q. Did he actually have a cerebral episode, probably due to this thing hitting him on the head?

A. At this time, do you mean? [153]

Q. Had he had a condition, drawing it along towards a cerebral episode, do you think that this chandelier falling on his head might have accelerated or brought it forward more quickly than otherwise might have happened, the fact that he had the blow on his head?

A. We couldn't have determined that during his first stay in the hospital. In view of his subsequent history there was nothing in his first admission to the hospital, either in his examination, his clinical course, that would lead us to believe that anything was going to happen in the future as it did.

Q. How about the second one?

A. That is an altogether different story.

Q. He was brought back into the hospital a second time?

A. Some months later, yes.

(Testimony of Ralph B. Cloward, M.D.)

Q. Did your observation of him on the second visit tend you to form perhaps a more broader opinion after observation of him, a different opinion than that which you had formed on his first admission?

A. In reference to the severity of the injury to his head?

Q. I say the casual relationship, that existing condition, and the history of accident as it had been brought out.

A. No, it didn't cause me to change my impression at all. As a matter of fact, when I first examined him on his first admission and recognizing the nature of the changes in his brain that had brought about this condition, it didn't once enter my mind that this injury he had had several months previously might [154] have contributed to it, at the time, until some weeks later, when the patient himself brought up to me the fact that he thought the scratch on his head had made him paralyzed.

Q. What do you mean by the examination of his brain, Doctor?

A. As I stated, on first admission any patient who has had any trouble with his head, we do what we call a neurological examination. That is an examination to determine the function of the different parts of the brain and all the nerves in the body, to see if any of them are not functioning properly, or if all of them are functioning normally. And in such an examination we can determine that the part of the nervous system that has ceased to

(Testimony of Ralph B. Cloward, M.D.)

function or that the function has altered, and in this particular patient we were faced at first with a partial weakness or paralysis of his left side.

Q. (By Mr. White) Doctor, what period of hospitalization are you referring to?

A. This is No. 2 that he asked me about.

Q. No. 2

A. Yes, sir. At this time the patient was admitted on the 26th of February.

Q. On the date of his first admission were there any neurological signs?

A. None, as I said. I think none whatsoever, and on his discharge from the hospital there was none, on the 24th of December. [155]

Q. (By Comm. Gray) Pardon me just a moment. Dr. Cloward, what caused you to make the neurological examination then on the second admission if you found that on his admission results were entirely negative?

A. I don't get your question, Mr. Gray.

Q. What I am trying to get at is this.

A. We examine all these patients.

Q. Here we have a man, according to the evidence that is in the record, and I think Mr. White will agree with me, we will leave the distance out, that the globe fell and struck him on the head and shortly thereafter he became disabled; he entered your hospital, he was in there for a certain length of time and then was discharged; he held several conferences with some difficulty, as the record will

(Testimony of Ralph B. Cloward, M.D.)

show, consulting with these people and trying to straighten out his work, and then re-entered your hospital. Now, all I am interested in is simply this. A workman has an object strike him on the head; apparently he has some indefinite, indiscernible condition existing; we have a record that prior to the time that the globe fell on him that he was one of these individuals who worked hard, long hours, giving the best that he had to the job; following this he became pau, finished, he was unable to work. All I am trying to do is to find out whether or not medically there was any causal relationship between the condition that followed after this blow and the underlying pre-existing condition. Frankly, that is my position.

Mr. White: I think Dr. Cloward answered that a few [156] minutes ago when he said that on the occasion of Mr. Piatt's second admission to the hospital his condition was different.

Comm. Gray: Unfortunately, Dr. Cloward was not in a position to either see or know of the characteristics of the individual prior to the time he was injured. He is simply going on his medical observation of the man, which is perfectly all right. We want the medical opinion.

The Witness: And the story that the patient gave me.

Comm. Gray: He observed him twice. All we are anxious to do is to obtain Dr. Cloward's testimony as an expert as to the possible causal relation, where a man had been working and demonstrated an

(Testimony of Ralph B. Cloward, M.D.)

ability to work prior to this accident, and what happened to him afterwards.

A. Anyone who sees a person once or twice a day for a period of five or six months can get a pretty broad impression of the individual's personality or characteristics.

Comm. Gray: We admit that.

A. Other than just the medical position. And I very soon formed an opinion of Mr. Piatt's personality. I could see that he was what the psychiatrists term manic depressive. These individuals have definite swings in their mood. At one time they will have tremendous drive, a tremendous amount of force to go ahead and do their job, and something happens to them and the next minute they are clear down in the depths of depression and they won't move off of their seat. That was the impression of Mr. Piatt's personality that I got during the period I took care. [157]

Q. (By Comm. Gray) You have handled thousands of these cases, have you, Doctor?

A. I imagine so, in ten years. Your direct question as to what I considered the causal relationship between this injury and his subsequent paralysis——

Q. That is the question.

A. Yes. My impression is this, entirely in a nutshell. I don't think that we could say positively, one way or the other, that the injury to his head caused his paralysis, but from experience——

(Testimony of Ralph B. Cloward, M.D.)

Q. Even for a temporary period, we will say? For a period of what you would nominally consider the necessity of getting over the result of a concussion that he had?

A. Yes. From our knowledge and experience of diseases of the brain and things that cause paralysis, we recognize that changes in the brain can bring about the picture such as Mr. Piatt had. Any paralysis that is brought on by an accident to the head will come in two ways. Either it will come immediately at the time of the injury, and that paralysis is either due to a fracture of the skull, with destruction of the part of the brain that moves the extremities, or is due to a very rapid loss of blood inside of the head that presses on the brain. Paralysis of that type will come on immediately or within a period of a few minutes or hours after the injury. That he didn't have. The second type of paralysis that a person can get following a head [158] injury is due to a slow gradual accumulation of blood on the outside of the brain. With such paralysis the individual gradually over this period loses the function of his extremities. It does not come on suddenly; it comes on slowly. He will get awkwardness of his hand, his hand will get heavy; every day it gets a little weaker and weaker and weaker, and over the period of weeks—I think the longest case I ever had was two months—he becomes completely paralyzed on that side.

(Testimony of Ralph B. Cloward, M.D.)

Those are the only two types of paralysis that you can get by an injury of this type.

Q. It applies in this case?

A. I say those are the only two types of paralysis you can get following an injury to the head. If an individual goes from the time of his injury two or three or four or five months and then suddenly, out of a clear sky, develops a paralysis of his extremity, in the intervening period being perfectly well and showing no signs of paralysis, then the conclusion, I am sure, would be of all neurologists that he has had a second lesion. By that I mean a condition has arisen separate and apart from his original injury. And that was my impression of Mr. Piatt.

Q. Gradual weakening of the blood vessels being one thing?

A. No. I mean a separate condition altogether, a separate diagnosis. Between Mr. Piatt's discharge from the hospital and his second admission, from the neurological standpoint he was [159] perfectly normal. I examined him, I think, two or three times in my office and the only thing I found on these examinations was again his extreme nervousness and the elevation in his blood pressure, which was always in the office around 190—180 to 90 systolic. This accident came on very suddenly, as he told me the next day. He was standing in his bath room, ready to shave, and his left side became weak.

(Testimony of Ralph B. Cloward, M.D.)

Q. That was February 26?

A. Yes, the 26th of February. Two months after he was discharged from the hospital. His left leg became weak; he fell to the floor. When his wife rushed in to pick him up his left side was completely paralyzed. The condition bringing about that paralysis was something that hit him suddenly and knocked out the function of that part of his brain. We recognize a sudden paralysis like that; it is called a vascular accident. Why "accident" I don't know. But it is usually due to one or two things: either a blood vessel in the brain ruptures or it becomes plugged up.

Q. Naturally there is an unexpected and untoward and unexplained condition.

A. That is a medical term—cerebral vascular accident—and it has nothing to do with trauma. Well, with this history and the findings of the weakness of his extremity that became completely paralyzed in the next few hours it was my impression that he had a cerebral accident, probably secondary to his high [160] blood pressure and having no relation whatsoever to his previous accident or previous injury.

Q. Let me ask you a question. Up until February 25 would it be reasonable to attribute any disability prior to February 26, the day that you saw him the second time, to the concussion as a matter of a temporary total disability due to his original injury?

(Testimony of Ralph B. Cloward, M.D.)

A. Disability from a concussion of the brain would necessarily have to include organic symptoms from injuries to the brain and functional symptoms of injury to the individual's personality and emotions. He didn't complain of headaches appreciable, dizzy spells, or things of that sort, that we hear patients complain of that have had a concussion of the brain. He was extremely nervous and high strung and jittery, and during the period, as was demonstrated by his blood pressure, and every time he would come into the office he would give us the same picture of the individual. Any disability from his first injury until he had this second accident I would say would probably be on an emotional basis rather than organic basis.

Q. But it might reasonably be attributed——

A. Yes.

Q. ——to the inception of the injury?

A. Yes.

Q. Now, after you observed him on the 26th and subsequently, would you care professionally to state in your best knowledge as an expert in neurological cases that the disability beyond [161] February 26, in your opinion, was not causally related to the minor blow that he received to his head?

A. Do you want me to answer that without any conditions whatsoever.

Q. No. You can qualify it, Doctor.

A. I said in the beginning that I didn't think

(Testimony of Ralph B. Cloward, M.D.)

any neurologist could say positively that an injury to the head, as minor as this seemed to be, might not in some way be related to subsequent changes that went on in his brain.

Q. What is its possibility and probability?

A. Well, it is possible but it is probably more probable.

Q. More probable. Considering the condition of the man and the underlying condition?

A. His underlying condition being his high blood pressure due to pre-existing changes in the arteries of his brain. If one of these arteries suddenly becomes plugged up, the brain that artery supplies is deprived of its blood supply and ceases to function. I don't know whether a person could say that plugging up was due to the blow he got on the head three months ago or not. My personal opinion would be that it had no relation to it whatsoever. I don't know what else I could say.

Our diagnosis of this second vascular accident was a thrombosis. In these hypertension cases there are two things that happen. Either a blood vessel breaks open and throws an unusual amount of blood into the brain and the brain loses its [162] function from the collection of blood, or one of the arteries gets plugged up.

Q. A blow of that kind, which you received a history of, would have been more probable to have made him susceptive to such a thrombosis?

Mr. White: I think the Doctor answered that

(Testimony of Ralph B. Cloward, M.D.)

question a few minutes ago, Mr. Gray, in answer to an equally general question.

Comm. Gray: All I am trying to do is get the facts. Here we have a man, as I understand it from the record, had been performing his work in more or less a normal state; an accident intervened and he has two occurrences, as we see them. The one was of a temporary nature; he returned to work and attended certain conferences, as the record will show, under difficulty. In fact, they cut the conferences short because of his apparent distress. Then his wife goes in and finds him in the bath room apparently in the throes of a paralytic state, and he is returned to the care of a doctor. Purely a medical question.

Mr. White: The doctor has already said that it is not.

Comm. Gray: I have to depend upon the Doctor's professional knowledge, and what I am trying to do, on the basis of his professional knowledge, is to determine the possibility or the probability of the second occurrence being related to the first occurrence.

Mr. White: He has already said in his personal opinion there is no relation. [163]

Comm. Gray: I have to determine it in the final analysis and I can only determine it on the basis of the advice that the doctors give to me. I am not trying to sway the Doctor's opinion; I am trying to find out what he thinks about it.

(Testimony of Ralph B. Cloward, M.D.)

Mr. White: May I interject a question?

The Witness: I said that in my opinion there would be no relation between the two, even though it seems like to to the layman. But from the pathological standpoint, that is, conditions in the brain that produce these different pictures, the one is not a part or parcel of the other.

Q. (By Comm. Gray): In other words, had there been no accident it may have followed in normal course? A. That is right.

Q. But with an intervening accident can you deny that the accident did not have any connection with it? A. No, I cannot deny it.

Q. Is there a strong possibility that the accident did have something to do with it?

A. I wouldn't say there was a strong possibility.

Q. Reasonable possibility?

A. I think it is very slight.

Q. I am not trying to lead you on.

A. If I had realized that this case was going to cause so much controversy—at the time it did not enter my mind that there would be any connection between this minor crack he had no his head and this vascular accident that we see in a large percent- [164] age or many people normally his age—I might have even attempted to open up the man's skull and take a look at his brain, to see what happened to it.

Q. But you did not do that?

(Testimony of Ralph B. Cloward, M.D.)

A. No, sir, I did not. I didn't see that it was indicated, because people who have these vascular accidents there is usually nothing you can do for them surgically. Once the damage is done nobody can repair it. If this blood vessel has a cork in it there is nobody can find that cork and take it out; by the time you would get in there and could find it it would be too late.

Comm. Gray: In fairness to you, Doctor, I think we have arranged to have a subsequent examination. Haven't we agreed on that?

Mr. White: Yes.

Comm. Gray: The whole thing is not to embarrass you.

The Witness: I have tried to bring out the different medical pictures that can produce these conditions.

Comm. Gray: Your instructions to us have been invaluable. Go ahead, Mr. White.

Q. (By Mr. White): Doctor, one of the witnesses at the prior hearing testified to a purported conversation with you, which was alleged to have occurred about December 13 or 14, in which you were alleged to have used the words "blood clot."

Comm. Gray: In the presence of the claimant's wife, I believe. [165]

Q. (By Mr. White): In the presence of the claimant's wife and a nurse. Was there at any time anything in your observation of the case which suggested a blood clot?

(Testimony of Ralph B. Cloward, M.D.)

A. On the first admission?

Q. Yes.

A. No, there was none whatsoever. If I made some statement to the wife or the nurse that I thought this man had a blood clot in his brain it was certainly done unintentionally.

Q. (By Comm. Gray): That is a possibility, isn't it, at any time, if a man has a vascular accident?

A. This was the first admission, after the crack on his head, December 3. Very often when attempting to explain some of these things to lay people, who know little about it, we may use terms that are more intelligible to them, realizing ourselves that from a medical standpoint that it is not the actual pathological situation, and I might have used the words "blood clot" in some of my discussions with the patient's wife.

Q. (By Mr. White): But from your observation of the case and your neurological examination there is no evidence whatsoever?

A. There was no evidence of any blood clot of any kind inside this man's head during his first admission to the hospital.

Q. (By Comm. Gray): How about the second admission? Did you find any evidence of blood clot during the second admission?

A. No, no. Our impression was that this was purely a thrombosis or plugging up of blood vessel, rather than a rupture of a blood vessel. [166]

Q. What is a thrombosis?

(Testimony of Ralph B. Cloward, M.D.)

Mr. White: Just one more question. I think perhaps Dr. Cloward has not described officially for the record just the condition he did find on February 26 when Mr. Piatt was returned to the hospital.

Q. (By Mr. White): Will you describe that for us? That is insofar as it was manifest?

Comm. Gray: On the second admission.

A. Yes.

Comm. Gray: I have the record here.

A. The patient was completely conscious. As a matter of fact, he said he hadn't lost consciousness at all in this vascular accident. On his examination immediately after his admission to the hospital, and I saw him a few minutes after he came in, he had complete paralysis of the left side of his face and marked weakness of both the left arm and leg. On encouragement and violent effort on the patient's part he was able to raise his left arm and use all of the muscles in this extremity. His face, however, was completely paralyzed so that he couldn't smile or pull up the corner of his mouth. I saw him, I think, three times that first day, and on the third visit, late in the evening, this apparent weakness which he had had in the morning had progressed to a complete paralysis of the left upper extremity so that he had no voluntary movement whatsoever in his hand furthermore, or upper arm. He was still able, however, to move his lower extremi- [167] ty, although the weakness here was

(Testimony of Ralph B. Cloward, M.D.)

more profound. And there was also change in the sensation of the left half of his body, there being a decrease in all forms of sensory stimulae with the normal side.

Q. What was your diagnosis at that time—cerebral thrombosis? A. Yes.

Q. Will you explain for the record what that is?

A. I think I explained a little earlier the difference between thrombosis and hemorrhage. Had this paralysis been due to hemorrhage or rupture of a blood vessel his paralysis would have been complete and profound on his admission to the hospital or immediately after it happened. The fact that on his admission to the hospital he had merely weakness, without paralysis, a gradually progressive weakness to a paralyzed condition within twelve hours, indicated that the process in his brain producing the paralysis was one of slow formation, and that we recognize as thrombosis or plugging of one of the arteries of the brain.

Comm. Gray: Is there anything else, Mr. White?

Mr. White: I think that is all.

Comm. Gray: We will adjourn this hearing and transfer the case to San Francisco.

(June 30, 1943, 3:06 p.m. The hearing was adjourned.) [168]

Territory of Hawaii,
First Judicial Circuit—ss.

I, Carey S. Cowart, Certified Shorthand Reporter, do hereby certify that on the 30th day of June, 1943 I reported in shorthand the testimony adduced and proceedings had on a hearing before John C. Gray, deputy commissioner, U. S. Employees' Compensation Commission, Pacific District, at Honolulu, T. H., in Case No. DB-P-1-4042, John B. Piatt, claimant, versus Contractors, PNAB, and Liberty Mutual Insurance Company, respondents; I further certify that the foregoing 28 pages contains a full, true, and correct transcript of my shorthand notes taken as aforesaid.

Dated this 10th day of June, 1943.

CAREY S. COWART
Certified Shorthand Reporter.

[Endorsed]: Filed Sept. 7, 1944. [169]

In the District Court of the United States for the Western District of Washington, Northern Division

No. 851

LIBERTY MUTUAL INSURANCE COMPANY, a corporation and Contractors, Pacific Naval Air Bases, an association,

Libellants,

v.

WILLIAM A. MARSHALL, Deputy Commissioner of United States Employees Compensation Commission for the Fourteenth District and JOHN B. PIATT,

Respondents.

MOTION TO DISMISS

Comes now William A. Marshall, Deputy Commissioner of the United States Employees Compensation Commission for the Fourteenth Compensation District, defendant in the above entitled cause, and respectfully moves the Court for an order dismissing the bill of complaint for mandatory injunction herein.

This motion is based upon the files and records in the above entitled cause.

J. CHARLES DENNIS
United States Attorney

G. D. HILE
Asst. United States Attorney

Copy Received: Mar. 29, 1944.

EGGERMAN, ROSLING & WILLIAMS
Attorneys for Libellants

[Endorsed]: Filed Apr. 5, 1944. [170]

[Title of District Court and Cause.]

ORDER GRANTING DEFENDANT JOHN B. PIATT PERMISSION TO INTERVENE

This matter came on regularly for hearing before the undersigned, one of the judges of the above-entitled court, and defendant having made motion to intervene in the above cause upon the ground and for the reason that if judgment is entered herein in behalf of petitioner it will adversely affect John B. Piatt, defendant, and the court being fully advised in the premises, now therefore, it is

Ordered, Adjudged and Decreed that John B. Piatt be given and is hereby granted permission to intervene in the above-entitled cause.

Done in Open Court this 14th day of August, 1944.

JOHN C. BOWEN
Judge

Presented by:

KOENIGSBERG & SANFORD
Attorneys for Defendant

Approved as to form:

HERBERT O'HARE
Ass't U. S. Atty.
JOSEPH J. LANZA
Attny for Plff.

[Endorsed]: Filed Aug. 14, 1944. [171]

[Title of District Court and Cause.]

ORAL DECISION OF THE COURT GRANTING MOTION TO DISMISS

Be It Remembered, that heretofore and on to-wit, October 18, 1944, at the hour of 2:00 p.m., the above entitled matter came regularly on for hearing on Respondents' Motion to Dismiss, before the Hon. John C. Bowen, one of the Judges of said Court;

Libellants appearing by Joseph J. Lanza, Esq., (Messrs. Eggerman, Rosling & Williams), their proctors and counsel;

Respondents appearing by L. M. Koenigsberg, Esq., (Messrs. Koenigsberg & Sanford), their proctors and counsel;

Whereupon, the following proceedings were had: [172]

The Court: On December 1, 1942, the Claimant, John B. Piatt, while working at his desk in his office furnished by his employer, sustained a blow on his head by a falling light globe and light globe shade, weighing altogether about three and a half pounds.

The immediate results of that accident were that Mr. Piatt experienced dizziness immediately after receiving the blow, and sustained a laceration and puncture of the skin of the scalp.

He was conducted by two or more of his business associates to a first aid station where he received first aid and was sent home.

On the second day thereafter he returned to his office for the purpose of attending a conference, but had to leave the conference because of physical weakness and discomfort. Thereafter he was sent to a hospital where he received treatment for about twelve days.

After this first period of hospitalization he returned to his home and made daily visits to his office for the purpose of putting in some time on his business duties, but he usually did not put in a full day at his office and returned to his home earlier than the end of business hours each day. He thus partially attended to his business duties daily until about the 26th of February, 1943, when, while resting in the early morning he collapsed in the bathroom of his home with a paralytic stroke. He thereupon was re-hospitalized and continued in the hospital until about the 5th of May, 1943.

Off and on during most of the time from the day of his injury until the day of his discharge from the hospital [173] and down to the time of the hearings before the Deputy Commissioner, Mr. Piatt complained of headaches and dizziness and of being unable to concentrate his mind efficiently

on business tasks. These symptoms were likewise testified to by business associates of Mr. Piatt.

The Deputy Commissioner found that Mr. Piatt's present condition of total disability is the result of the accident which occurred on December 1, 1942. There is ample non-medical testimony in support of that finding. I do not take the view that there was no medical testimony tending to support the Deputy Commissioner's findings; on the contrary, I think there was some medical testimony in support of such findings. For example, Dr. Cloward's statement to Mrs. Piatt concerning the blood clot not dissolving as a reason for the Doctor keeping Mr. Piatt in bed in a reclining position longer than the Doctor had expected to do; and also Dr. Cloward's testimony that it could not be said positively whether the accident caused the paralysis or not, and that cerebral paralysis could develop quickly or gradually and progressively.

It is contended by Claimant that his paralysis developed gradually and progressively after the accident. Libelants contend that the blow on the claimant's head had nothing to do with his cerebral thrombosis which caused his disability.

It seems to me, without attempting to make a detailed analysis at this time, that the evidence in this record amply supports the Deputy Commissioner's findings and award. In fact, I do not see how one reading this record could come to any conclusion as to the cause of Mr. Piatt's disability [174] other than the one the Deputy Commissioner came to.

I am aware that three doctors gave it as their final opinion that the present disability, directly attributable to cerebral thrombosis, was not caused by this accident, but I have some considerable doubt whether or not either of these doctors had accurately in mind in expressing that opinion some of the vital facts underlying that opinion. While I realize these doctors have expressed conclusions different from those of the Deputy Commissioner, yet from the careful study that this record merits and which I have attempted to give it, I find myself not convinced by the medical opinions. On the other hand, I am, in view of the whole record including the non-medical testimony, convinced of the correctness of the Deputy Commissioner's findings and award.

I have taken the time necessary to carefully consider all of the authorities that Counsel have collected and exhaustively reviewed in their oral arguments before the Court. The great weight of Federal Court authority is to the effect that, even where all the medical testimony is all one way, the Deputy Commissioner is not bound by such medical testimony, if there is other competent testimony requiring a finding different from that indicated by the medical testimony.

Upon the authority of Southern S. S. Co. vs. Norton, 41 F. Supp. 108, Ryan Stevedoring Co. vs. Norton, 50 F. Supp. 221, Frank Marra vs. Norton, 56 F. (2d) 246, and McNeelly vs. Sheppeard, 89 F. (2d) 956, which in effect hold that the Deputy Commissioner is not required to follow the testi-

mony of medical experts where there is other com- [175] petent evidence to support the findings made by the Deputy Commissioner, it is the opinion and decision of the Court that the motion to dismiss the complaint should be granted and the Deputy Commissioner's findings and award should be confirmed.

Mr. Lanza: Exception.

The Court: The Employer and insurance carrier note an exception to the Court's ruling, and such exception is allowed.

Mr. Koenigsberg: Does your Honor wish to fix attorney fees in this matter at this time?

The Court: An attorney's fees of $200 is allowed, payable from the award at a rate not to exceed $20 from each bi-weekly installment.

[Endorsed]: Filed Oct. 20, 1944. [176]

[Title of District Court and Cause.]

ORDER GRANTING MOTION TO DISMISS AND AFFIRMING FINDINGS AND AWARD OF COMMISSIONER

This Matter came on regularly for hearing before the undersigned, one of the Judges of the above entitled court, Wednesday, October 11, 1944, at 10:00 o'clock a.m., and was continued from time to time, argument being concluded on October 16, 1944, plaintiffs appearing by J. Lanza of Egger-

man, Rosling & Williams, their attorneys, defendants appearing by their attorney, Herbert O'Hare, Assistant United States Attorney, Assistant to J. Charles Dennis, United States Attorney, and Leo M. Koenigsberg appearing for defendant, John B. Piatt, and it having been stipulated in open court by and between counsel for all the parties that the transcript of all the testimony taken before the Deputy Commissioner and all the exhibits including hospital records and others introduced at the hearings before the Deputy Commissioner and the reports of doctors who examined claimant be considered part of the files and records in this cause and the court be deemed to have considered all of said records for the purpose of making its determination and ruling, and the court having perused and considered all of said records, the argument of counsel, and the briefs [177) submitted by counsel, and being fully advised in the premises, and motion having been made by defendants to dismiss the petition for injunctive relief,

Now, therefore, it is

Ordered, Adjudged and Decreed that the motion to dismiss the petition to set aside the Deputy Commissioner's award as not being in accordance with law be and is hereby granted, and that the Deputy Commissioner's finding of fact and award be and is hereby affirmed.

It Is Further Ordered, Adjudged and Decreed that legal services rendered to defendant, John B. Piatt, by Leo M. Koenigsberg are of the reasonable value of $200.00; that Leo M. Koenigsberg has

heretofore received from John B. Piatt the sum of $25.00, out of which he expended $2.00 for filing his appearance in this cause, and that the defendant, John B. Piatt, shall have credit for $23.00, leaving a balance due of $117.00 on said attorney's fees; that the plaintiff shall pay said sum to Leo M. Koenigsberg, which payment shall constitute a lien on the compensation now due or hereafter to become due to said defendant, John B. Piatt, and said plaintiff shall be permitted to satisfy said lien by deducting $17.70 from each bi-weekly payment now due or hereafter to become due, making said deductions until such time as the full sum of $117.00 paid to Leo M. Koenigsberg has been fully satisfied.

The plaintiff excepts to all of the foregoing and the exception is hereby allowed.

Done in Open Court this 20th day of October, 1944.

JOHN C. BOWEN
Judge

Presented by:

L. M. KOENIGSBERG
Attorney for Defendant Piatt

Approved:

HERBERT O'HARE
Asst. United States Attorney
By L. M. KOENIGSBERG

O. K. as to form:

JOSEPH J. LANZA
Attorneys for Plaintiff

[Endorsed]: Filed Oct. 20, 1944. [178]

[Title of District Court and Cause.]

NOTICE OF APPEAL TO CIRCUIT COURT OF APPEALS

Notice Is Hereby Given that Liberty Mutual Insurance Company, a corporation, and Contractors, Pacific Naval Air Bases, an association, libelants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the order granting motion to dismiss and affirming findings and award of Commissioner entered in this action on the 20th day of October, 1944.

JOSEPH J. LANZA
EGGERMAN, ROSLING & WILLIAMS
Attorneys for Libellants

Address: 918 Vance Building, Seattle, Wash.

Received a copy of the within Notice this 16 day of Jan., 1945.

J. CHARLES DENNIS
U. S. Attorney
Attorney for William A. Marshall

Copy Received. Date 1-16-1945.

KOENIGSBERG & SANFORD
Attorneys for Defendant
By B. TAYLOR

[Endorsed]: Filed Jan. 16, 1945. [179]

United States Fidelity and Guaranty Company
Baltimore, Maryland

No. ..... $.....

In the District Court of the United States for the Western District of Washington, Northern Division

No. 851

LIBERTY MUTUAL INSURANCE COMPANY, a corporation, and CONTRACTORS, PACIFIC NAVAL AIR BASES, an Association,
Libelants,

vs.

WM. A. MARSHALL, Deputy Commissioner of the United States Employees Compensation Commission for the 14th Compensation District, and JOHN B. PIATT,
Respondents.

Know All Men by These Presents: That we, Liberty Mutual Insurance Company, a corporation, and Contractors, Pacific Naval Air Bases, an Association, as Principals, and United States Fidelity and Guaranty Company, a corporation of Baltimore, Maryland, authorized to do the business of surety in the State of Washington, as surety, acknowledge ourselves to be jointly indebted to Wm. A. Marshall, Deputy Commissioner of the United States Employees Compensation Commission for the 14th Compensation District, and John

B. Piatt, Respondents, in the above entitled cause, in the sum of Two Hundred Fifty and No/100 ($250.00) Dollars, conditioned that, whereas, on the 20th day of October, 1944, in the District Court of the United States for the Western District of Washington, Northern Division, in a suit pending in that Court wherein Liberty Mutual Insurance Company, a corporation, and Contractors, Pacific Naval Air Bases, an Association, were libelants, and Wm. A. Marshall, Deputy Commissioner of the United States Employees Compensation Commission for the 14th Compensation District, and John B. Piatt, were Respondents, an order was entered granting motion to dismiss and affirming findings and award of Commissioner, and the said Libelants having filed in the office of the Clerk of the said District Court a notice of appeal to the United States Circuit Court of Appeals for the Ninth Circuit, to be held in the City of San Francisco, in the State of California.

Now, Therefore, the condition of the above obligation is such, that if the said Liberty Mutual Insurance Company, a corporation, and Contractors, Pacific Naval Air Bases, an Association, shall prosecute its appeal to effect and answer all costs, if the appeal is dismissed or by judgment affirmed, or all such costs as the appellate court may award if the judgment is modified, then the above obligation is void, else to remain in full force and effect.

Sealed with our seals and dated this 12th day of January, 1945.

LIBERTY MUTUAL INSURANCE COMPANY, and CONTRACTORS, PACIFIC NAVAL AIR BASES, an Association,

By JOSEPH J. LANZA,
one of their attorneys

[Seal] UNITED STATES FIDELITY AND GUARANTY COMPANY

By JOHN C. McCOLLISTER
Attorney-in-fact. [180]

State of Washington
County of King—ss.

On the 12th day of January, 1945, before me personally appeared John C. McCollister to me known to be the Attorney-in-fact of the corporation that executed the within and foregoing instrument, as surety, and acknowledged said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument and that the seal affixed is the corporate seal of said corporation.

In witness whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

[Seal] J. C. BEERON

Notary Public in and for the State of Washington, residing at Seattle.

State of Washington
County of King—ss.

On this 16th day of January, 1945, before me personally appeared Joseph J. Lanza, to me known to be one of the attorneys for and on behalf of said Liberty Mutual Insurance Company, a corporation, and Contractors, Pacific Naval Air Bases, an association, that executed the within and foregoing instrument as principals, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation and association for the uses and purposes therein mentioned, and on oath stated that he was authorized to execute said instrument.

In Witness Whereof I have hereunto set my hand and affixed my official seal the day and year first above written.

KATHRYN BRYAN
Notary Public in and for the State of Washington, residing at Seattle

[Endorsed]: Filed Jan. 16, 1945. [181]

[Title of District Court and Cause.]

STATEMENT OF POINTS ON WHICH APPELLANTS INTEND TO RELY ON APPEAL

The following is a concise statement of the points on which Appellants intend to rely on appeal:

1. That there is no substantial evidence in the record to support the finding of the Deputy Commissioner that the accident that occurred on December 1, 1942, was the direct proximate cause of

the cerebral thrombosis that occurred on February 27, 1943.

2. That the Claimant failed to sustain the burden of proof upon the issue of whether the accident that occurred on December 1, 1942, was the direct and proximate cause of the cerebral thrombosis that occurred on February 27, 1943.

3. That the finding of the Deputy Commissioner as above, is a mere assumption based upon possibility and conjecture instead of substantial proof, and is therefore not in accordance with law.

4. That the Deputy Commissioner in making the finding as above, ignored all of the medical evidence presented herein.

5. That the United States District Court for the Western District of Washington, Northern Division, erred in entering its order granting Defendants' motion to dismiss and affirming the findings and award of the Deputy Commissioner.

Dated this 20th day of January, 1945.

JOSEPH J. LANZA
EGGERMAN, ROSLING & WILLIAMS
Attorneys for Appellant.

Received a copy of the within Statement this 20th day of Jan. 1945.

J. CHARLES DENNIS,
Atty. for Wm. A. Marshall

Copy Received. Date 1-20-1945.

KOENIGSBERG & SANFORD

[Endorsed]: Filed Jan. 20, 1945. [182]

[Title of District Court and Cause.]

APPELLANTS' DESIGNATION OF RECORD, PROCEEDINGS AND EVIDENCE TO BE CONTAINED IN THE RECORD ON APPEAL

Come now the Appellants above named, and pursuant to Rule 75 of the Rules of Civil Procedure pertaining to record on appeal to the Circuit Court of Appeals, herewith designates the following portion of the record, proceedings and evidence to be contained in the record on appeal:

1. Bill of complaint for mandatory injunction filed December 29, 1943 and Exhibit "A" thereto attached.

2. Certification of record of Deputy Commissioner Wm. A. Marshall filed January 22, 1944, including the following:

a. Transcript of testimony taken at hearing held by Deputy Commissioner John C. Gray at Honolulu, T. H., on June 2, 1943.

b. Employer's and insurance carrier's Exhibit "A" (Part 1), being photostatic copies of hospital record.

c. Employer's and insurance carrier's Exhibit "A" (Part 2), being photostatic copies of hospital record.

d. Report of Dr. Howard A. Brown, dated June 23, 1943.

e. Report of Dr. Ernest H. Falconer, M.D., dated June 23, 1943. [183]

f. Telegram addressed to John B. Piatt, dated June 11, 1943 and signed by Dr. Robert Bulman.

g. Compensation order filed by Wm. A. Marshall on November 29, 1943.

3. Certification of record of Deputy Commissioner Wm. A. Marshall filed September 6, 1944, including the following:

a. Transcript of record of a continued hearing held before Deputy Commissioner Gray at Honolulu on June 30, 1944.

4. Motion to dismiss filed April 5, 1944.

5. Order granting defendant John B. Piatt permission to intervene filed August 14, 1944.

6. Transcript of oral decision of the court granting motion to dismiss.

7. Order granting motion to dismiss and affirming findings and award of Commissioner filed October 20, 1944.

8. Notice of appeal to Circuit Court of Appeals filed January 16, 1945.

9. Cost bond on appeal filed January 16, 1945.

10. Appellants' designation of contents of record on appeal filed January 20, 1945.

11. Statement of points on which appellants intend to rely appeal.

12. Certificate of clerk to transcript of record on appeal.

Dated this 20th day of January, 1945.

JOSEPH J. LANZA
EGGERMAN, ROSLING &
WILLIAMS
Attorneys for Appellants

Received a copy of the within Designation this 20th day of Jan., 1945.

J. CHARLES DENNIS
Attorney for Wm. A. Marshall

Copy Received. Date 1-20-1945.

KOENIGSBERG & SANFORD
Attorney for Defendant
By B. TAYLOR

[Endorsed]: Filed Jan. 20, 1945. [184]

[Title of District Court and Cause.]

STIPULATION AND APPLICATION FOR ORDER FOR TRANSMITTAL OF EXHIBITS TO APPELLATE COURT

It Is Hereby Stipulated between appellants and appellees, through their respective attorneys of record, that an order may be entered herein directing the Clerk of this court to transfer to the appellate court the original exhibits known as "Employer's and Insurance Carrier's Exhibit A (Part 1)" and "Employer's and Insurance Carrier's Exhibit A (Part 2)" for purposes of inspection by the appellate court in connection with the appeal now pending herein.

Dated this 17th day of February, 1945.

EGGERMAN, ROSLING &
WILLIAMS
JOSEPH J. LANZA
Attorneys for Appellants
J. CHARLES DENNIS
U. S. District Attorney
Attorneys for Appellee
Wm. A. Marshall
LEO M. KOENIGSBERG
Attorney for Appellee
John B. Piatt

[Endorsed]: Filed Feb. 19, 1945. [185]

[Title of District Court and Cause.]

ORDER DIRECTING CLERK TO SEND ORIGINAL EXHIBITS TO APPELLATE COURT

It Having Been Stipulated Herein between appellants and appellees thru their respective attorneys of record, that an order may be entered herein directing the Clerk to transmit the original exhibits known as "Employer's and Insurance Carrier's Exhibit A (Part 1)" and "Employer's and Insurance Carrier's Exhibit A (Part 2)", for purposes of inspection by the appellate court, and this court being of the opinion that the original of said exhibits should be inspected by the appellate court, upon the ground that said exhibits are not readily copiable into the record, now therefore

It Is Hereby Ordered that the Clerk of this court transmit to the appellate court the originals of said exhibits for purposes of inspection by the appellate court in connection with the appeal pending herein.

Done in Open Court this 19th day of February, 1945.

JOHN C. BOWEN
District Judge

Presented by

JOSEPH J. LANZA
of Attorneys for Appellants

Approved as to form.

HERBERT O'HARE
Asst. U. S. Atty.

Approved.

L. M. KOENIGSBERG

[Endorsed]: Filed Feb. 19, 1945. [186]

[Title of District Court and Cause.]

STIPULATION FOR ORDER EXTENDING THE TIME FOR FILING THE RECORD ON APPEAL AND DOCKETING OF ACTION

Pursuant to Rule 73 (g) of the Rules of Civil Procedure it is hereby stipulated between Appellants and Appellees through their respective attorneys of record, that the District Court may extend the time for filing the record on appeal with the

appellate court and docketing the action in that court to the 10th day of March, 1945.

Dated this 23 day of February, 1945.

JOSEPH J. LANZA
EGGERMAN, ROSLING & WILLIAMS
Attorneys for Appellants
J. CHARLES DENNIS
U. S. District Attorney
HERBERT O'HARE
Asst. U. S. District Attorney
Attorneys for W. A. Marshall
L. M. KOENIGSBERG
Attorney for John B. Piatt

[Endorsed]: Filed Feb. 23, 1945. [187]

[Title of District Court and Cause.]

ORDER ON STIPULATION EXTENDING TIME FOR FILING THE RECORD ON APPEAL AND DOCKETING THE ACTION

Pursuant to stipulation filed herein and by virtue of the authority granted to the District Court by Rule 73 (g) of the Rules of Civil Procedure, now therefore

It Is Hereby Ordered that the time for filing the record on appeal with the appellate court and docketing the action in that court, is hereby extended to the 10th day of March, 1945.

Done in Open Court this 23 day of February, 1945.

JOHN C. BOWEN
District Judge

Presented by:

JOSEPH J. LANZA
Of Counsel for Libelants

O. K. for entry:

HERBERT O'HARE
Asst. U. S. District Atty.
Atty. for Wm. A. Marshall

L. M. KOENIGSBERG
Attorney for John B. Piatt

[Endorsed]: Filed Feb. 23, 1945. [188]

[Title of District Court and Cause.]

APPELLANTS' SUPPLEMENTAL DESIGNATION OF RECORD TO BE CONTAINED IN THE RECORD ON APPEAL

Come Now the appellants above named, and herewith designate the additional portion of the record to be contained in the record on appeal:

1. Stipulation and application for order for transmittal of original exhibits to appellate court.

2. Order directing Clerk to transmit original exhibits to appellate court.

3. Clerk's certificate as to exhibit transmitted to appellate court.

4. Appellants' supplemental designation of record.

Dated this 19th day of February, 1945.

JOSEPH J. LANZA
EGGERMAN, ROSLING & WILLIAMS
Attorneys for Appellants

Copy received 2/16/45.
L. M. KOENIGSBERG

Copy received 2/19/45.
HERBERT O'HARE
Asst. U. S. Atty.

[Endorsed]: Filed Feb. 19, 1945. [189]

[Title of District Court and Cause.]

APPELLANTS SECOND SUPPLEMENTAL DESIGNATION OF RECORD TO BE CONTAINED IN THE RECORD ON APPEAL

Come now the Appellants above named and the herewith designate the additional portion of the record to be contained in the record on appeal:

1. Stipulation and Order extending time for filing record and docketing case in the appellate court.

2. This second supplemental designation of record.

Dated this 23 day of February, 1945.

JOSEPH J. LANZA
EGGERMAN, ROSLING & WILLIAMS
Attorneys for Appellants

Copy Received this 23 day of Feb. 1945:

L. M. KOENIGSBERG
Atty. for John B. Piatt
HERBERT O'HARE
Asst. U. S. District Attorney
Atty. for Wm. A. Marshall

[Endorsed]: Filed Feb. 23, 1945. [190]

[Title of District Court and Cause.]

CERTIFICATE OF CLERK TO TRANSCRIPT OF RECORD ON APPEAL

United States of America
Western District of Washington—ss.

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify that the foregoing typewritten transcript of record, consisting of pages numbered 1 to 190, inclusive, is a full, true and complete copy of so much of the record, papers and other proceedings in the above and foregoing entitled cause as is required by Designation of Counsel filed and shown herein, as the same remain of record on file in the office of the Clerk of said District Court at Seattle and that the same constitute

the record on appeal from the order of dismissal of said United States District Court for the Western District of Washington to the United States Circuit of Appeals for the Ninth Circuit. [191]

I further certify that the following is a true and correct statement of all expenses, costs, fees and charges incurred in my office for making record, certificate or return to the United States Circuit Court of Appeals for the Ninth Circuit, to-wit:

Clerk's Fees (Act of February 11, 1925) for making record, certificate or return.

438 folios at 05c	$21.90
36 folios at 15c	5.40
Appeal fee (Section 5 of Act)	5.00
Certificate of Clerk to Transcript of Record	.50
Certificate of Clerk to Original Exhibits	.50
Total	$33.30

I further certify that the foregoing fees have been paid by the attorney for the appellants.

In Witness Whereof I have hereunto set my hand and affixed the official seal of said District Court at Seattle, in said District, this 31st day of January, 1945.

[Seal] MILLARD P. THOMAS,
Clerk
By BONITA WATKINS
Deputy Clerk [192]

[Endorsed]: No. 10995. United States Circuit Court of Appeals for the Ninth Circuit. Contractors, Pacific Naval Air Bases, an association, and Liberty Mutual Insurance Company, a corporation, Appellants, vs. Wm. A. Marshall, Deputy Commissioner of the United States Employees' Compensation Commission for the Fourteenth District and John B. Piatt, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Northern Division.

Filed March 2, 1945.

PAUL P. O'BRIEN

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

The United States Circuit Court of Appeals
for the Ninth Circuit

No. 10995

LIBERTY MUTUAL INSURANCE COMPANY, a corporation, and CONTRACTORS, PACIFIC NAVAL AIR BASES, an Association,
Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner of the United States Employees Compensation Commission for the 14th Compensation District, and JOHN B. PIATT,
Appellees.

STIPULATION AND APPLICATION FOR ORDER DISPENSING WITH THE REPRODUCTION OR PRINTING OF EXHIBITS

It Is Hereby Stipulated between Appellants and Appellees, through their respective attorneys of record, that an order may be entered herein dispensing with the reproduction or printing of Exhibits known as "Employer's and Insurance Carrier's Exhibit 'A' (Part 1)" and "Employer's and Insurance Carrier's Exhibit 'A' (Part 2)", being copies of hospital records, laboratory reports, nurses records, and temperature, pulse and respiration sheets, upon the grounds and for the reason that the temperature, pulse and respiration sheets are

not of a printable type, and the cost of printing the balance of said records would prove expensive and unduly extend the length of the Transcript of Record to be printed herein.

It Is Further Stipulated that said Exhibits may be considered by this Court in the form in which they are included in the District Clerks Record on appeal, without reproduction.

This Application is based upon the affidavit of Joseph J. Lanza, attached.

Dated this 19th day of February, 1945.

EGGERMAN, ROSLING & WILLIAMS
JOSEPH J. LANZA
Attorneys for Appellants.
J. CHARLES DENNIS
U. S. District Attorney
HERBERT O'HARE
Asst. U. S. District Attorney
Attorneys for Appellee,
William A. Marshall.
L. M. KOENIGSBERG
Attorney for Appellee,
John B. Piatt.

Ordered that the original exhibit "A" referred to herein, in two parts, need not be printed, but will be considered by the Court in its original form.

CURTIS D. WILBUR
Senior United States Circuit Judge.

AFFIDAVIT IN SUPPORT OF FOREGOING APPLICATION

State of Washington
County of King—ss.

Joseph J. Lanza, being first duly sworn on oath deposes and says: That he is an attorney at law, admitted to practice in the Courts of the State of Washington and in the District Court of the Ninth Circuit, and is one of the attorneys for Appellants in the above entitled and number cause; that he makes this affidavit in support of the foregoing application for order dispensing with the reproduction or printing of the Exhibits therein specified; that said Exhibits consist of forty-nine (49) pages of hospital records, laboratory reports, nurses records, and temperatures, pulse and respiration sheets; that a great portion thereof consisting of the temperature, pulse and respiration sheets, are not of a printable type; that while the balance of the records of said Exhibits are of a printable type, the printing of the same will prove expensive and unduly extend the size of the transcript of record to be printed herein.

JOSEPH J. LANZA

Subscribed and sworn to before me this 19 day of February, 1945.

[Seal] KATHRYN BRYAN
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed Mar. 5, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPELLANTS' STATEMENT OF POINTS ON WHICH THEY INTEND TO RELY ON APPEAL AND DESIGNATION OF THE RECORD DEEMED NECESSARY FOR THE CONSIDERATION THEREOF

Come now Appellants and, pursuant to Subdivision 6, Rule 19, of the Rules of the United States Circuit Court of Appeals for the Ninth Circuit, herewith adopt the statement of points filed in the District Court upon which Appellants intend to rely on appeal, and herewith designate the entire transcript of record as prepared and certified by the Clerk of the District Court, to be printed for purposes of this appeal.

Dated this 23 day of February, 1945.

JOSEPH J. LANZA
EGGERMAN, ROSLING & WILLIAMS
Attorneys for Appellants

Service of the foregoing by receipt of true copy thereof is hereby acknowledged this 23 day of February, 1945.

J. CHARLES DENNIS
U. S. District Attorney
HERBERT O'HARE
Asst. U. S. District Attorney
Attorneys for Wm. A. Marshall, Deputy Commissioner
L. M. KOENIGSBERG
Attorney for John B. Piatt

[Endorsed]: Filed Mar. 5, 1945. Paul P. O'Brien, Clerk.

No. 10995

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

CONTRACTORS, PACIFIC NAVAL AIR BASES, an Association, and LIBERTY MUTUAL INSURANCE COMPANY, a Corporation,
Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner of the United States Employees' Compensation Commission for the Fourteenth District and JOHN B. PIATT,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANTS

EGGERMAN, ROSLING & WILLIAMS,
D. G. EGGERMAN,
EDW. L. ROSLING,
DEWITT WILLIAMS,
JOSEPH J. LANZA,
Attorneys for Appellants.

918 Vance Building,
Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

No. 10995

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

CONTRACTORS, PACIFIC NAVAL AIR BASES, an Association, and LIBERTY MUTUAL INSURANCE COMPANY, a Corporation,
Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner of the United States Employees' Compensation Commission for the Fourteenth District and JOHN B. PIATT,
Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANTS

EGGERMAN, ROSLING & WILLIAMS,
D. G. EGGERMAN,
EDW. L. ROSLING,
DEWITT WILLIAMS,
JOSEPH J. LANZA,
Attorneys for Appellants.

918 Vance Building,
Seattle 1, Washington.

THE ARGUS PRESS, SEATTLE

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UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

CONTRACTORS, PACIFIC NAVAL AIR BASES, an Association, and LIBERTY MUTUAL INSURANCE COMPANY, a Corporation, *Appellants*, vs. WM. A. MARSHALL, Deputy Commissioner of the United States Employees' Compensation Commission for the Fourteenth District and JOHN B. PIATT, *Appellees.*	No. 10995

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

BRIEF OF APPELLANTS

INTRODUCTORY

This is an appeal from the final decree of the District Court granting appellees' motion for dismissal of appellants' Bill of Complaint for Mandatory Injunction and affirming the findings and award of William A. Marshall, Deputy Commissioner of the United States Employees' Compensation Commission

for the 14th Compensation District, respecting the claim of John B. Piatt filed therewith (Tr. 129-131).

JURISDICTION

District Court

The jurisdiction of the District Court is believed to be sustained by subdivision (b) of Section 21 of the Longshoremen's and Harborworkers' Compensation Act (Public Law No. 803—69th Congress) as amended (33 U.S.C.A. Sec. 921(b)) which reads in part as follows:

> "If not in accordance with law, a compensation order may be suspended or set aside, in whole or in part, through injunction proceedings, mandatory or otherwise, brought by any party in interest against the deputy commissioner making the order, etc."

and under subsection (b) of Section 3 of the Defense Base Act (Public Law No. 208—77th Congress) (42 U.S.C.A. Sec. 1653(b)), reading in part as follows:

> "Judicial proceedings provided under Sections 18 and 21 of the Longshoremen's and Harborworkers' Compensation Act in respect to a compensation order made pursuant to this act shall be instituted in the United States District Court of the judicial district wherein is located the office of the Deputy Commissioner whose compensation order is involved if his office is located in a judicial district," etc.

Circuit Court

The jurisdiction of this court is believed to be sus-

tained by Judicial Code Sec. 128(a) (28 U.S.C.A. Sec. 225(a)), reading in part as follows:

> "The Circuit Courts of Appeal shall have appellate jurisdiction to review by appeal final decisions—
>
> "First. In the District Courts in all cases save where a direct review of the decision may be had in the Supreme Court under Section 345 of this title."

The decree appealed from was entered on October 20, 1944 (Tr. 129, 131); within three months thereafter, pursuant to Section 240-8(c) of the Judicial Code (28 U.S.C.A. Sec. 230), to-wit, on January 16, 1945, Notice of Appeal was served and filed in accordance with Rule 73(a) and (b) of the Rules of Civil Procedure (Tr. 132). Cost Bond on appeal in the sum of $250.00 was filed with the Notice of Appeal on January 16, 1945, pursuant to Rule 73(c) of the Rules of Civil Procedure (Tr. 133-136). Designation of Record, Proceedings and Evidence to be contained in the Record of Appeal was served and filed January 20, 1945, pursuant to Rule 75(a) of the Rules of Civil Procedure (Tr. 138-140). Statement of Points on which Appellants Intend to Rely on Appeal was served and filed January 20, 1945, pursuant to Rule 75(d) of the Rules of Civil Procedure (Tr. 136-137). Order extending time for filing the record on appeal and docketing the action to March 10, 1945, was entered by the District Court on February 23, 1945, pursuant to Rule 73(g) of the Rules of Civil Procedure (Tr. 143-144).

STATEMENT OF THE CASE

The question involved is whether there is any substantial evidence in the record to support the award of compensation by the Deputy Commissioner based upon a finding that the cerebral thrombosis, suffered by claimant John B. Piatt on February 26, 1943, was caused by an injury sustained by him December 1, 1942, when a glass composition indirect lighting globe fell from the ceiling and struck claimant on the head while in the employment of Contractors, Pacific Naval Air Bases, in the Territory of Hawaii.

The following is a brief summary of the evidence:

Claimant had been employed by the Contractors, Pacific Naval Air Bases, as a Procurement Agent in the Hawaiian Islands since December of 1939 (Tr. 17 and 26).

On December 1, 1942, claimant, then fifty-four and one-half years of age, was hit on the head by a three and one-quarter pound glass composition indirect lighting globe (Tr. 58) which fell from the ceiling, while he was sitting at his desk (Tr. 18, 19). The blow made him dizzy, but not unconscious (Tr. 36). The blow caused a very small cut on the upper forehead above the hairline (Tr. 20, 35). With the aid of two co-workers, he walked over to the first aid station about three or four hundred feet from the place where he had been hit (Tr. 60). There, Dr. Stewart removed a piece of glass from the cut, painted it, and told claimant to go home and keep quiet for 24 hours (Tr. 20).

The next morning, claimant went to the office for

a short conference lasting about an hour and one-half, which split up prematurely due to his fatigue and distress. He expressed a desire to see and be checked up by Dr. Cloward (Tr. 21).

Dr. Cloward was not in, so his nurse told claimant to go home and she would have Dr. Cloward call him (Tr. 22). Claimant then went home, and about four o'clock that day, Dr. Cloward called claimant and told him to go to the hospital where he would see him. Claimant was admitted to the Queen's Hospital on December 3, where he remained a bed patient until December 24, 1942 (Tr. 23).

After spending about a week at home and during the first week in January, 1943, claimant went to Dr. Cloward's office for a check-up (Tr. 24). On January 11, 1943 (Tr. 32), claimant went back to the office, working three or four hours a day, gradually increasing his working time until he worked full time for three days before his collapse on February 26, 1943 (Tr. 24, 25, 33).

During this entire period he was under medical observation and received checkups by Dr. Cloward at least once a week, and sometimes twice a week (Tr. 25).

Just before going back to work on January 11, 1943, Dr. Cloward had an electro-cardiograph made of claimant's heart to see if there was any possible heart lesion that was helping to keep up his blood pressure. Dr. Cloward told him he was "O. K." and that he would even pass him for life insurance (Tr. 34).

After his discharge from the hospital on December 24, claimant stated that he did not feel fully recovered, and that he had headaches "like a tight band across the top of his head," extending to the rear portion thereof (Tr. 34, 35). That sensation was continuous for approximately the first week after leaving the hospital, and it was recurrent thereafter but did not last (Tr. 36).

On February 26, 1943, claimant, while preparing to go to work, collapsed in his bathroom (Tr. 38), which Dr. Cloward testified was due to a "cerebral vascular accident" and having no relation whatsoever to his previous accident or injury (Tr. 113).

Prior to the date of the occurrence of the first accident, claimant was a man of seemingly unlimited energy, in charge of purchasing material to keep eleven battallions of Navy Engineers busy (Tr. 50, 51, 62). After returning to the office after his first accident, his colleagues noticed that he had failed in memory, particularly as to details, that he was annoyed with details, and was nervous and excitable to such an extent that the officials reconsidered a decision to make him head of a new supply division (Tr. 53, 54, 63, 64).

As a result of the stroke suffered on February 26, 1943, claimant was again hospitalized at Queen's Hospital, and remained there until May 5, 1943. He was continuously under the care of Dr. Cloward during both periods of hospitalization and for the intervening period (Tr. 33).

On or about May 25, 1943, claimant filed claim for

compensation for disability with the United States Employees' Compensation Commission, under Public Law 208, 77th Congress, Act of August 16, 1941, commonly known as the "Defense Base Act," alleging that the cerebral thrombosis which occurred on February 26, 1943, was the result of the injury which occurred December 1, 1942 (Tr. 14, 15).

The employer and insurance carrier gave due notice that the claim was controverted, and denied that the disability commencing on February 26, 1943, was caused by or resulted from injuries sustained on December 1, 1942 (Tr. 16). The matter then came on for hearing before Deputy Commissioner John C. Gray at Honolulu, T. H., on June 2, 1943, the hearing being held at the home of the claimant who was residing in Honolulu at that time (Tr. 13, 14).

At that hearing, testimony of claimant John B. Piatt (Tr. 17-40), his wife, Frieda F. Piatt (Tr. 40-45, 68-72), George L. Youmans, Piatt's Supervisor (Tr. 45-49), Cmdr. H. P. Potter, USNR, Officer in Charge of the Fifth Construction Battalion (Tr. 49-56), and A. W. Morgan, Piatt's principal assistant (Tr. 56-67) was introduced.

Dr. Cloward, the attending physician, was unable to attend the hearing on that date to give his testimony (Tr. 27). However, at the conclusion of that hearing, claimant waived personal appearance at a further hearing when Dr. Cloward's testimony could be taken (Tr. 72, 73). Claimant at that time was planning to return to the United States, and it was therefore agreed at that hearing that if a further

examination could not be taken at the Queen's Hospital before claimant left for the mainland, he would stop in San Francisco for further examination by doctors there (Tr. 76).

On June 30, 1943, the matter came on for an adjourned hearing before Deputy Commissioner Gray, at which time the testimony of Dr. Cloward was taken and transcribed, personal appearance having been waived by claimant (Tr. 95-122).

At that hearing Dr. Cloward testified that he examined the claimant about one hour after his admission to the hospital on December 3, 1942 (Tr. 97), and that "the most striking thing about his examination was that of extremely high blood pressure," which as he recalled was somewhere around 240 or 230/140. Continuing, the doctor said:

> "That initial blood pressure, we felt, *was probably* due to primary hypertension that the patient had *prior to his injury*, although we attributed some of it to the extreme nervous state that he was in on his admission to the hospital." (Tr. 98-99)

The doctor further testified that examination of claimant's head revealed "no very extensive wound," "that would look as though he had been struck by any heavy object," and that "there was no large bump, swelling or bruise of contusion" that he could find. The following day, however, there was a small crust found in his scalp from a "scratch" which he may have received from a cut from glass (Tr.99).

The remainder of his examination was entirely negative, and purely from the "*story*" and *not* the

examination of the patient's nervous system, he made a "*tentative*" diagnosis of concussion of the brain. He explained that a diognosis of concussion very frequently had to be made purely on history rather than on findings, because if a concussion is not severe enough to render a patient unconscious it is usually not severe enough to bring about any other change in the brain that can be demonstrated by a neuro-logical examination (Tr. 99).

The doctor explained that the blood pressure in any individual is measured by the systolic and diastolic measurements, and that the normal systolic measurement is 120 and the normal diastolic measurement is from 80 to 100, although as a "rule of thumb," a normal systolic measurement could be 100 plus the individual's age. Thus, if a man is fifty-four years old and he has a systolic measurement of 154, it would be considered normal (Tr. 100, 101).

Dr. Cloward further testified that any paralysis which is brought on by an accident to the head will come in two ways. Either it will come immediately at the time of the injury, due to a fracture of the skull, with destruction of that part of the brain controlling the movement of the extremities, or due to a very rapid loss of blood inside the head that presses on the brain. Paralysis of that type will come on immediately or within a period of a few minutes or hours after the injury. *Claimant did not have that type of paralysis* (Tr. 111).

The second type of paralysis that can occur following a head injury, according to Dr. Cloward, is due to a slow, gradual accumulation of blood on the out-

side of the brain. With such paralysis, the individual gradually over this period loses the function of his extremities. *It does not come on suddenly; it comes on slowly.* He will get awkwardness of his hands, his hands will get heavy; every day it gets a little weaker, and over a period of weeks (he thought the longest case he ever had was two months), he becomes paralyzed on that side Tr. 111).

It was his opinion, therefore, that if an individual goes from the time of his injury, two, three, or four or five months, and then suddenly, out of a clear sky develops a paralysis of his extremities, in the intervening period being perfectly well and *showing no signs of paralysis,* then the conclusion of all neurologists would be that he had had a second "lesion." By that, he meant a condition has arisen separate and apart from his original injury. That was his impression of Mr. Piatt (Tr. 112). He further testified that between Mr. Piatt's first discharge from the hospital and his second admission, from the *neurological standpoint he was perfectly normal.* In his examination of Piatt two or three times in his office, in the intervening period, the only thing he found was his extreme nervousness and the elevation in his blood pressure which was always around 190 to 180 systolic (Tr. 112).

The doctor further testified that the condition that brought about the paralysis on February 26 was something that hit him suddenly and knocked out the functioning of that part of his brain. It is called a "vascular accident," usually due to one of two

things: either a blood vessel in the brain ruptures, or it becomes plugged up (Tr. 113).

The cerebral vascular accident has nothing to do with trauma. With this history and the findings of the weakness of his extremity that became completely paralyzed in the next few hours, it was the doctor's opinion that Piatt had had a cerebral accident "probably secondary to his high blood pressure and *having no relation whatsoever to his previous accident or previous injury*" (Tr. 113).

In answer to the question whether it would be reasonable to attribute any disability prior to February 26 to the concussion as a matter of a temporary total disability due to his original injury, the doctor said:

> "Any disability from his first injury until he had the second accident, I would say would probably be on an *emotional* basis rather than organic basis." (Tr. 114)

Again, when asked to give his opinion as an expert in neurological cases whether the disability beyond February 26 was causally related to the minor blow that he received to his head, the doctor replied:

> "I don't know whether a person could say that plugging up was due to the blow he got on the head three months ago or not. *My personal opinion would be that it had no relation to it whatsoever.* I don't know what else I could say." (Tr. 115).

Later on in the testimony, Dr. Cloward said:

> "I said that in my opinion there would be no relation between the two, even though it seems like to be the layman. But from the pathological

standpoint, that is, conditions in the brain that produce the different pictures, the one is not a part or parcel of the other.

"Q (COMM. GRAY): In other words, had there been no accident it may have followed in normal course?

A That is right.

Q Is there a strong possibility that the accident did have something to do with it?

A I wouldn't say there was a strong possibility.

Q Reasonable possibility?

A I think it is very slight." (Tr. 117)

Mrs. Piatt, at the first hearing, had testified that Dr. Cloward had used the word "blood clot" in describing Mr. Piatt's condition during his first stay in the hospital (Tr. 71). Accordingly, Dr. Cloward was asked at the adjourned hearing whether there was anything in his observation of the case which suggested a blood clot on the first admission to the hospital. He answered:

"No, there was none whatsoever. If I made some statement to the wife or the nurse that I thought this man had a blood clot in his brain, it was certainly done unintentionally." (Tr. 119)

He repeated the same answer later on by saying:

"There was no evidence of any blood clot of any kind inside this man's head during his first admission to the hospital." (Tr. 119)

Commissioner Gray then asked him whether he found any evidence of a blood clot during the second admission to the hospital, to which the doctor answered:

"No, no. Our impression was that this was

purely a thrombosis or plugging up of blood vessels, rather than a rupture of a blood vessel." (Tr. 119)

Dr. Cloward concluded his testimony by explaining what is meant by cerebral ~~trombosis~~ thrombosis in the following language:

"I think I explained a little earlier the difference between thrombosis and hemorrhage. Had this paralysis been due to hemorrhage or rupture of a blood vessel, his paralysis would have been complete and profound on his admission to the hospital or immediately after it happened. The fact that on his admission to the hospital he had merely weakness without paralysis, a gradually progressive weakness to a paralyzed condition, within twelve hours, indicated that the process in his brain producing the paralysis was one of slow formation, and that we recognize as thrombosis or plugging of one of the arteries of the brain." (Tr. 121)

It will be remembered that at the conclusion of the first hearing, Mr. Piatt had made plans to return to the mainland, and had agreed that upon arriving in San Francisco, he would submit to further examination by doctors there. Accordingly, he was hospitalized at the Franklin Hospital in San Francisco for observation and study by Drs. Howard A. Brown and Ernest H. Falconer.

In Dr. Brown's report, he observed that X-rays of the skull showed no sign of any fracture or other pathological change (Tr. 83). After reviewing the file submitted, including the reports from Honolulu and the hospital records in the case, and after dis-

cussion with Dr. Falconer, who examined Piatt from a medical standpoint, Dr. Brown stated his opinion as follows:

> "Discussion: This patient originally sustained a blow to the head without loss of consciousness, but with slight laceration of the scalp. He showed no evidence of any brain injury, according to Dr. Cloward's report. There was no evidence of a fracture of the skull.
>
> "Following that, the patient had some head discomfort, which would not be unusual, considering his hypertension. However, he reached a point where he was able to return to work, and it was almost three months after the original blow to the head that the patient developed evidence of a definite cerebral vascular accident. I would agree with the previous examining physician that this represented a cerebral thrombosis secondary to his vascular disease and hypertension.
>
> "Considering the length of time that elapsed, following the blow to the head, plus the fact that this was a slight injury without evidence of any brain damage, I do not feel that there is any connection between the cerebral vascular accident occurring February, 1943, and the head blow of December, 1942.
>
> "The patient very definitely shows the hypertension and vascular changes which are a causative factor in the cerebral thrombosis, and, in my opinion, *this condition would have occurred regardless of whether the patient had a blow to the head in December or not.*" (Tr. 83, 84)

Dr. Falconer, after a complete examination, concluded his report with the following discussion and opinion:

> "This patient sustained a moderately severe

head injury on December 1, 1942. There was no loss of consciousness, no skull fracture, no evidence of any brain injury. He had rather protracted symptoms after the head injury due to his age and the fact that he has cerebral arteriosclerosis and hypertension.

"Patient returned to his work, and almost three months after his head injury, he suffered a thrombosis of a cerebral vessel, diminishing the blood supply to certain centers in the brain that control the muscular movements of face, arm and leg on the left side of the body. Cerebral thrombosis means that a clot forms inside a cerebral vessel. *I do not see any possible connection between the formation of this clot inside a cerebral vessel and his head injury nearly three months before.*

"He has evidence of arteriosclerosis in the fundi of the eyes, also in the kidneys as his urine shows constantly a small trace of albumin.

"On account of his hypertension his future is uncertain and he will be a candidate for future trouble of the type he is now suffering." (Tr. 89, 90)

After leaving San Francisco, Mr. Piatt returned to his home in Oregon, and the file was accordingly transferred to Deputy Commissioner William A. Marshall of the Fourteenth Compensation District, whose office is located at Seattle. No additional hearing was had before Mr. Marshall, and the only other evidence submitted to him were the medical reports of Drs. Brown and Falconer. After reading the record as thus made up, and without ever seeing the claimant or any of the witnesses in the case, Mr. Marshall

made and entered his compensation award on November 29, 1943, in favor of claimant based upon a finding holding in effect that the injury sustained by claimant on December 1, 1942, was the cause of the disability not only from December 1, 1942, to and including January 10, 1943, but also from February 26, 1943, continuously thereafter (Tr. 91-93).

The employer and insurance carrier, feeling aggrieved by said order, filed complaint for mandatory injunction on December 29, 1943, pursuant to Section 21 of the Longshoremen's & Harborworkers' Compensation Act (Tr. 2-12).

In due course, appellees filed a motion to dismiss (Tr. 123), and the matter came on for hearing before the District Court. On October 18, 1944, the District Court rendered its oral decision granting appellees' motion to dismiss upon the theory that the evidence in the record supported the Deputy Commissioner's findings and award, since the Deputy Commissioner under the authorities was not required to follow the testimony of the medical experts (Tr. 125-129).

The court's order granting the motion to dismiss and affirming the findings and award of the Commissioner was thereafter duly entered on October 20, 1944 (Tr. 129-131). This appeal followed.

SPECIFICATION OF ERRORS

1. There is no substantial evidence in the record to support the finding of the Deputy Commissioner that the accident that occurred on December 1, 1942, was the direct proximate cause of the cerebral thrombosis that occurred on February 26, 1943.

2. The claimant failed to sustain the burden of proof upon the issue of whether the accident that occurred on December 1, 1942, was the direct and proximate cause of the cerebral thrombosis that occurred on February 26, 1943.

3. The finding of the Deputy Commissioner as above, is a mere assumption based upon possibility and conjecture, instead of substantial proof, and is therefore not in accordance with law.

4. The Deputy Commissioner in making the finding as above, ignored all of the medical evidence presented herein.

5. The United States District Court for the Western District of Washington, Northern Division, erred in entering its order granting appellees' motion to dismiss and affirming the findings and award of the Deputy Commissioner.

ARGUMENT

Inasmuch as the various specifications of error are so inter-related that the argument upon one necessarily involves a discussion on each of the others, and in order, therefore, that this brief will not be unduly encumbered with repetitious arguments, ap-

pellants will treat all the assigned errors in one argument, a brief summary of which is as follows:

1. The findings must be supported by "substantial evidence."
2. Substantial Evidence: Necessity of medical testimony.

I.

The Findings Must Be Supported by "Substantial Evidence"

The statute with which we are concerned provides:

> "If not in accordance with law, the compensation order may be suspended or set aside in whole or in part * * *." (33 U.S.C.A. 921(b))

This language was construed by Mr. Chief Justice Hughes in *Crowell v. Benson*, 285 U.S. 22, 46, 52 S. Ct. 285, 291, 76 L. ed. 598, 610, to mean that, "* * * the findings of the Deputy Commissioner, *supported by evidence* and within the scope of his authority, shall be final" (Our italics). This construction was arrived at to support the validity of the act in the year 1932.

Thereafter, and in January of 1944, the Circuit Court of Appeals for the Second Circuit decided the case of *Steamship Terminal Operating Corporation, et al. v. Schwartz*, 140 F.(2d) 7, 8, and in a *per curiam* opinion said:

> "* * * The Supreme Court has several times declared that if there is evidence to support the findings of a Deputy Commissioner, they must be affirmed; and by this we understand 'substantial' evidence."

Further clarification of the construction and meaning of the phrase "supported by evidence," as used

by the Supreme Court in the *Crowell* case, is contained in *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 229, 83 L. ed. 126, 140, where the Supreme Court, in construing a similar provision in the National Labor Relations Act said:

> "We agree that the statute, in providing that 'the findings of the Board as to the facts, if supported by evidence, shall be conclusive,' means supported by *substantial evidence.* * * * Substantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." (Our italics)

Again, in *National Labor Relations Board v. Columbian E. & S. Co.*, 306 U.S. 292, 299, 83 L. ed. 660, 665, the Supreme Court, speaking of the National Labor Relations Act, said:

> "Section 10(e) of the Act provides: '* * * the findings of the Board as to the facts, *if supported by evidence*, shall be conclusive.' But as has often been pointed out, this, as in the case of other findings by administrative bodies, means evidence which is substantial, that is, affording a substantial basis of fact from which the fact in issue can be reasonably inferred. * * * Substantial evidence is more than a scintilla, and must do more than create a suspicion of the existence of the facts to be established." (Our italics)

In the light of the foregoing cases, there can be no question but that a compensation order is not "in accordance with law" and may therefore be set aside by the reviewing court, if the findings upon which the order is based are not supported by "substantial evidence."

As said by the court in *National Labor Relations Board v. Compson Products, Inc.*, 97 F.(2d) 13 (C. C.A. 6th Cir.) at page 15:

> "The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power. Testimony is the raw material out of which we construct truth and, unless all of it is weighed in its totality, errors will result and great injustices be wrought."

This case, therefore, presents the narrow issue: Are the findings of the Deputy Commissioner as to causal relationship supported by "substantial evidence" as these words are above defined?

II.

Substantial Evidence: Necessity of Medical Testimony

It is obvious that we are dealing here with a highly complicated medical subject requiring, of necessity, the opinion of expert medical testimony to establish the pathological cause of the cerebral thrombosis suffered by claimant on February 26, 1943.

That Deputy Commission Gray, who conducted the original hearing on the matter, clearly recognized that fact, will be seen from his careful and painstaking examination of Dr. Cloward, during which he said:

> COMM. GRAY: "All I am trying to do is get the facts. Here we have a man, as I understand it from the record, had been performing his work in more or less a normal state; an accident intervened and he has two occurrences, as we see them. The one was of a temporary nature;

he returned to work and attended certain conferences, as the record will show, under difficulty. In fact, they cut the conferences short because of his apparent distress. Then his wife goes in and finds him in the bath room apparently in the throes of a paralytic state, and he is returned to the care of a doctor. *Purely a medical question.*"

COMM. GRAY: "I have to depend upon the doctor's professional knowledge, and what I am trying to do, on the basis of his professional knowledge, is to determine the possibility or the probability of the second occurrence being related to the first occurrence."

COMM. GRAY: "I have to determine it in the final analysis and *I can only determine it on the basis of the advice that the doctors give to me.* I am not trying to sway the doctor's opinion; I am trying to find out what he thinks about it." (Tr. 116)

The rule as to the necessity of medical testimony in such cases is well stated in 32 C.J.S. Sec. 569d, page 399, as follows:

"As a general rule the weight to be given the opinion of a medical or other expert witness as to the cause or effect of a happening, condition, situation, or circumstance is for the jury or other trier of the facts, and the opinion is not conclusive, *but when the subject under consideration is one within the knowledge of experts only, and there is no reason for the exercise of common knowledge, undisputed expert testimony which is based on scientific processes, methods, or knowledge is to be accepted as conclusive by the trier of the facts,* provided the credibility of the witness or witnesses is accepted. An expert opinion as to cause or effect may constitute substantial

> evidence, sufficient to support a finding in accordance with the opinion. Expert evidence as to causal connection is not necessary where facts are testified to by lay witnesses with sufficient clearness that laymen in ordinary affairs of life can infer cause from effect, *but, where an injury is of such a character as to require skilled and professional men to determine the cause thereof, the question is one of science, which must be proved by the testimony of skilled and professional men.*"

Certainly the cause of the cerebral thrombosis in question here, involves a determination of abstruse physical processes, concerning which a layman can have no well-founded knowledge, and can do no more than indulge in mere speculation and conjecture.

Clearly, the cause thereof is purely a question of science which must be proved by the testimony of skilled and professional men.

A well-reasoned case bearing out this principle is *Pacific Employers Ins. Co. v. Ind. Acc. Comm.*, 118 P.(2d) 334 (Cal. 1941). There the question was whether there was any evidence in the record to support the award of compensation based upon a finding that a varicose ulcer from which applicant was suffering constituted a new and further disability proximately caused by an injury for which the claimant had already received medical treatment.

There, as in this case, the medical experts testified or reported that there was no causal relation between the original injury and claimant's subsequent condition. There was evidence, however, that the subsequent ulcer was in the exact site or in the region of

the original ulcer. Also, the claimant testified that her personal ~~physical~~ physician told her that the original injury was responsible for her subsequent condition.

The court, in setting aside the award as not based on "evidence," announced the following principles:

1. The findings of the Commission are subject to review only insofar as they have been made without any evidence whatever in support thereof.
2. An award of compensation may not be based upon surmise, conjecture or speculation.
3. Evidence that the subsequent ulcer was in exact site or in the region of the original ulcer, standing alone, was not sufficient upon which to base an award upon the ground that the original injury proximately caused a new and further disability.
4. The *location* of the subsequent ulcer in the region of the former could be proved by testimony of a layman, who observed its external appearance, but the *cause* of such ulcer could best be proved by one having expert scientific knowledge.
5. Witnesses of common experience from ordinary observation and obvious facts may testify as to the existence of the physical or mental condition, but the pathological cause of an ailment is a scientific question upon which it is necessary to obtain scientific knowledge.

Concluding its opinion, the court said:

> "The Commission evidently disregarded the testimony of experts introduced by the petitioner herein to the effect that the present ulcer was in no way related to the original injury. This was within the province of the Commission, but

it leaves the record devoid of evidence upon an ultimate fact on a scientific question."

Likewise, the record here is barren of any expert medical testimony establishing a causal connection between the accident that occurred on December 1, 1942, and the cerebral thrombosis which developed approximately three months thereafter, on February 26, 1943. Thus, Dr. Cloward, who was the attending physician, testified that claimant's collapse on February 26, 1943, was due to cerebral thrombosis, which had no connection whatever with the blow received on December 1, 1942. He admitted that, to a layman, there might appear to be some connection, but not to him. He concluded, after watching the claimant for a few days, that he was a "maniac depressive type," and said that the high blood pressure from which the claimant was suffering at the time he first examined him, was not due to the accident, and that this high blood pressure caused the vascular accident that resulted in his paralysis.

Dr. Howard A. Brown, who examined claimant at the Franklin Hospital in San Francisco in June, 1943, after observation and study, concluded his report by saying that the hypertension and vascular changes which are a causative factor in the cerebral thrombosis, would have occurred regardless of whether the patient had a blow to the head in December or not.

Dr. Falconer, who likewise examined the claimant in consultation with Dr. Brown, gave as his unqualified opinion that there was no possible connection between the formation of the clot that formed inside

claimant's cerebral vessel and his head injury nearly three months before.

In *City of Owensboro v. Day*, 145 S.W.(2d) 856 (Ky. 1940), the court said:

> "When the disputed fact is one relating to a particular science, concerning which only an expert may possess knowledge, then the witness necessarily becomes an expert in that science, since laymen are not supposed to — and in a great majority of cases do not—possess knowledge concerning the involved, obscure and scientific facts. Therefore, in a case like this one, the only competent witnesses to prove the concrete and decisive fact involved must necessarily be members of the medical profession. Laymen can, and they did in this case, testify concerning many relevant facts — concerning the conduct, effect, external symptoms, reduction in weight, and other occurrences and conditions having a more or less bearing upon the case, but, after all, the expert witness must be consulted in order to arrive at a correct conclusion."

The court below, in its oral decision, did not concede, of course, that there was no medical testimony tending to support the findings. It gave two examples of what it considered "medical testimony" in support of such findings:

(1) Dr. Cloward's purported statement to Mrs. Piatt concerning the blood clot not dissolving as a reason for the doctor keeping Mr. Piatt in bed in a reclining position longer than the doctor had expected to do; and

(2) Dr. Cloward's testimony that it could not be said positively whether the accident caused the paralysis or not, and that cerebral par-

alysis could develop quickly or gradually and progressively.

It is submitted that neither one of these examples constitutes medical testimony of such quality or degree as can be said to be "substantial evidence" as heretofore defined. At most, they constitute nothing more than "scintilla" and do nothing more than "create a suspicion of the existence of the fact to be established."

Considering the first example given by the court, there are three answers to the same:

(1) The statement was "mere uncorroborated hearsay" and as such does not constitute "substantial evidence." *Consolidated Edison Co. v. National Labor Relations Board*, 305 U.S. 197, 230, 83 L. ed. 126, 140.

(2) Dr. Cloward testified positively that there was no evidence of any blood cot during the claimant's first admission to the hospital, and that if he ever made such a statement to claimant's wife, it was "certainly done unintentionally." (Tr. 119)

(3) The statement of itself does not establish causal relationship.

As to the second example of medical testimony given by the court below, the following may be said:

(1) The mere fact that Dr. Cloward stated that he didn't think it could be said positively one way or the other that the injury to claimant's head caused his paralysis, certainly, of itself, would not constitute "substantial evidence" upon which the finding of causal relationship could be based, since it amounts to nothing more than a statement of doubt on the subject;

(2) His testimony must be read in its entirety, and the meaning thereof not distorted by selecting a word or phrase here and there. His explanation as to the two methods whereby paralysis is brought about through an accident to the head, when read in its entirety, establishes that claimant's paralysis did not come from either method. It certainly did not come on immediately following the blow, and *it did not come on gradually*, since it was not evidenced by any awkwardness of the function of claimant's extremities during the intervening period. There was no evidence that claimant showed any signs of paralysis from December 1, 1942, to February 26, 1943. On the contrary, the evidence was undisputed that the paralysis came on suddenly on the latter date, *with no intervening signs of paralysis in the interim.* How, then, can it be said that Dr. Cloward's explanation that cerebral paralysis could develop quickly or gradually and progressively, supports the finding of causal relationship herein, from a medical standpoint?

The lower court, however, did not rely upon these examples of so-called "medical testimony" upon which to base its decision. Rather, it felt that support for the finding of causal relationship could be found in the *non-medical testimony*, and that the medical testimony to the contrary could be disregarded.

In other words, medical testimony was not necessary to establish the pathological cause of the cerebral thrombosis suffered by claimant, but that proof thereof may be established from the testimony of laymen concerning the conduct, effect and external symptoms of the claimant.

The lower court as authority for such a conclusion relied upon the following four cases, the facts and holdings of which are as follows:

1. *Southern S.S. Co. v. Norton*, 41 F. Supp. 108 (D.C. Penn. 1941). There, the employee was struck on the face over his eye by a cargo net. He testified that his vision was impaired after the accident, although it had not been impaired prior thereto. One of the doctors who examined the employee at the instance of the Deputy Commissioner, reported that there was a partially dislocated lens in his eye which with other conditions present, was sufficient to account for the diminution in vision. He further stated that in his opinion "this condition could have been caused by the above injury. Likewise, it was perfectly possible that this could have existed before the injury."

Another impartial physician rendered his report, in which it was stated that there was a dislocated lens in the left eye, and that "this man's condition may be due to the accident or it may have existed prior to this injury."

Several doctors, testifying for the employer, stated that while there was some physical injury to the eye due to the accident, the latter caused no impairment of sight.

On the basis of this evidence, the court held that there was sufficient competent evidence to support a finding by the Commissioner to the effect that the injury did result from the accident.

In the first place it does not appear from the decision whether any interval of time elapsed between the occurrence of the accident and the subsequent

diminution in vision. In all probability howver, both occurred simultaneously. Secondly, all doctors agreed that there was some physical injury to the eye due to the accident, the only dispute being whether such physical injury caused impairment of sight. Thirdly, one of the doctors gave as his opinion that the impairment in vision could have been caused by the injury. Lastly, this was a case where laymen in ordinary affairs of life could infer cause from effect, for obviously if the testimony of the employee was believed that his left eye and vision was normal prior to the accident, but that he could not see so well after the accident, and doctors corroborated the presence of actual physical injury to the eye, medical testimony positively establishing a causal relation was obviously unnecessary.

In the case at bar, however, the original accident and the paralysis that manifested itself did not follow each other in such immediate sequence as to permit laymen in ordinary affairs of life to infer cause from effect. Also in the case at bar, all the doctors were unanimous in their several opinions that there was no causal connection, and that the paralysis was due to hypertension and vascular changes, which were not in any way related to the original blow. In other words, the medical testimony definitely and positively established no causal relation. This was not even a "doubtful" case from a medical standpoint.

2. The next case relied upon by the lower court was *Ryan Stevedoring Co. v. Norton*, 50 F. Supp. 221 (D. C. Penn. 1943). There, the opinion does not disclose the nature of the injury or the disabiilty involved.

The decision merely states that the claimant was injured on April 25, 1939, and was disabled intermittently to August 4, 1940, and received compensation for this disability. In August of 1941, claimant filed a claim for compensation on the ground of recurrence of the disability, and after a hearing, an award was made for compensation for a period of about four weeks. Thereafter, there was a further recurrence of disability, and compensation was voluntarily paid until February 12, 1942. In April, 1942, the claimant filed an application for review, and an order was entered allowing compensation for a period terminating April 2, 1942. The award which plaintiffs sought to set aside was made August 28, 1942, and granted compensation to the claimant for a three-week period beginning August 6, 1942, on the ground that claimant had suffered another recurrence of total disability during that period.

At the hearing, the only doctor who testified stated that there was no causal connection between claimant's present disability and the accident of April 25, 1939. However, the award was sustained on the basis of claimant's own testimony as to his condition and ability to work prior to the accident and the pain which he suffered during the period in question when he attempted to perform any physical labor, a condition which had recurred intermittently for a period of several years since the injury.

In connection with that case, it may be said that since the nature of the injury or disability involved is not disclosed, it might therefore very well be that the cause of the disability was not of the type re-

quiring expert medical testimony. Furthermore, the disability involved was apparently a subjective condition, and one for which compensation was allowed as late as April 2, 1942. The facts in that case, therefore, are so obviously dissimilar to the facts in the case at bar, as to rob the decision of any convincing weight.

3. The third case relied upon by the lower court was *Frank Marra v. Norton*, 56 F.(2d) 246 (D.C. Penn. 1931). There, the question was whether the employee died in consequence of the injuries sustained, or whether his death was due to what are usually termed natural causes. The opinion does not disclose the type of injury or the interval that elapsed between the two events.

The medical testimony was merely to the effect that the death might have been due to the injuries received. The Court conceded that if the expert testimony was all the evidence in support of the findings made, it would have been insufficient. But it said that there was other evidence, without specifying it, that would support the finding, and therefore the expert testimony need not have been relied upon.

That case is likewise weak as authority in view of the nondisclosure of the type of injury received and of the time intervening before the death resulted. It may very well have been therefore that laymen in ordinary affairs of life could infer cause from effect, from the facts themselves, without the aid of expert opinion. Certainly, the cause of a death is not within the peculiar province of expert opinion in every instance.

4. The last case cited by the court as authority is *McNeelly v. Sheppeard*, 89 F.(2d) 956 (5th Cir. 1937). There, the question was whether the pneumonia which the employee died of was caused through becoming overheated and suddenly chilled as a result of his employment. The Deputy Commissioner found that the working conditions were otherwise normal, and that neither the work in which he was engaged nor the conditions of his employment caused him to become overheated. He thereupon denied compensation. The employee's physician testified that he thought the cause of death was the natural result of the condition under which he worked, but he also testified that sleeping in a draught, or driving in an automobile, or other exposure could cause it, and that often a man in good health could take pneumonia without any exposure; it coming from different causes and being no respecter of persons.

The District Court affirmed the order denying compensation, saying that the physcian's opinion, while admissible, was not conclusive.

It will be noted that this case does not involve the occurrence of any accident. Furthermore, pneumonia was shown not to be an occupational disease. At any rate, this was a case where the subject under consideration was not one within the knowledge of experts only, but one within the common knowledge of laymen. It is difficult to see how this decision stands in the way of a reversal of the order complained of.

Additional cases were cited by Appellees in the lower court as authority for the statement that the Deputy Commissioner is not bound to accept the opinion or

theory of any particular medical examiner, and that he may rely upon his own observation and judgment in conjunction with the evidence. These cases will be discussed in chronological order:

1. *Joyce v. United States Deputy Commissioner*, 33 F.(2d) 218 (D.C. Me. 1929). This case was the first to announce that doctrine and cited no cases in support thereof. The case, however, does not involve a question of causality, but merely a determination of the percentage of disability sustained by an employee to his hand. The court recognizes that the question was not "wholly a medical question."

This was clearly a case where the Deputy Commissioner was in as good a position to pass on the question *from his own observation*, as any doctor could do, since the injury was visible.

2. *Jarka Corporation v. Norton*, 56 F.(2d) 287 (D. C. Penn. 1930). The injury involved herein was a fracture of a bone in the spinal column. The question involved was not strictly a matter of causation, but merely whether the pain which the claimant complained of wwas due to the fracture. A disinterested doctor testified as to "possibility." The opinion likewise does not cite any case on this point.

3. *Zurich General Accident & L. Ins. Co. v. Marshall*, 42 F.(2d) 1010 (D.C. Wash. 1930). The injury involved was a fractured back and a dislocated shoulder. Several doctors testified that the claimant was totally incapacitated from following the duties of a longeshoreman. The question was whether claimant was actually disabled, and the matter of causation was

in no way involved. The opinion merely states that the *Joyce* case *supra* "is in harmony herewith."

4. *Booth v. Monahan*, 56 F.(2d) 168 (D.C. Me. 1930). This opinion was written by the same judge who wrote the opinion in the *Joyce* case *supra*. Like the *Joyce* case, it involved merely the percentage of disability sustained to an injured limb, and does not involve the question of causation.

5. *Baltimore & Ohio R.R. Co. v. Clark*, 56 F.(2d) 212 (D.C. Md. 1932). In this case, the employee died two days following an attack of heat prostration. Actually there was medical testimony in support of the finding of causal relationship. It will be further noted that a comparatively short interval intervened between the two events.

6. *Liberty Stevedoring Co. v. Cardillo*, 18 F. Supp. 729 (D.C. N.Y. 1937). In this case, there was involved an injury to the foot. The claimant was under continuous medical treatment at a hospital for one and a half years. His leg was eventually amputated. Medical evidence supported the finding of causal relationship.

It will be seen from a review of each of the foregoing cases that the question of causation was not involved in many of them, and in those where that question was involved, there was medical testimony in support of the finding. These cases go no further than to state the rule that the Deputy Commissioner is not required to follow the testimony of medical experts where there is other *competent* evidence to support the finding. They do not pass upon the question of whether non-medical testimony *is* competent to prove

causation where the physical processes terminating in death or disability are obscure and abstruse, and concerning which a layman can have no well-founded knowledge. Appellants submit that the rule firmly established in the State courts to the effect that where disability for which compensation is sought under the Workmen's Compensation Act is of such a character as to require the determination of its nature, cause and extent to be made by professional persons, the only competent proof thereof must be made by the testimony of such witnesses, should be followed by this court.

A State decision on "all fours" with the situation involved in the case at bar, is *Burton v. Holden & M. Lbr. Co.*, 20 Atl.(2d) 99, 135 A.L.R. 512 (Vt. 1941). The case involved a determination of the cause of cerebral thrombosis and the sufficiency and necessity of expert medical testimony to support the finding and award of a Workmen's Compensation Commissioner. The facts were these:

On April 9, 1940, Burton, aged 61, was examined by a physician for hospital benefit insurance, and was found to be in normal condition for a man of his age, and no material hardening of the arteries was observed. On April 11, 1940, he got a sliver in his left thumb while working in the lumber yard of defendant employer. He was first treated by a doctor on April 18 following, who testified that Burton was then suffering from an infection of the injured thumb; that the infection was localized and did not go into his system at any time, and, although serious as far as the function of the thumb was concerned, was not

serious as far as his system was concerned; that the thumb healed perfectly well, but continued to be more tender than the other thumb, which was to be expected, inasmuch as there was new scar tissue there and the thumb had gone through a process of inflammation; that ten days to two weeks after the thumb had healed, he was again called upon to treat Burton, and found that he had difficulty in walking, had been a bit confused, was unable to get about his house without some help, and was in a weakened condition; and that he was taken to the hospital, where he remained three weeks, until he died of cerebral thrombosis on June 19, 1940. *The doctor further testified that in his opinion the infection could have been a possible contributing cause of the thrombosis.* The question certified for review was whether the evidence concerning the alleged causation of death by the injury to decedent's thumb was legally sufficient to support the finding that the injury to the decedent's thumb resulted in his death.

The Supreme Court of Vermont, in annulling the order of the Commissioner of Industrial Relations, said:

> "There are many cases where the facts proved are such that any layman of average intelligence would know, from his own knowledge and experience, that the injuries were the cause of death. In such a case the requirements of law are met without expert testimony. * * * But where, as here, the physical processes terminating in death are obscure and abstruse, and concerning which the layman can have no well-founded knowledge and can do no more than indulge in mere speculation, there is no proper foundation for a find-

ing by the trier without expert medical testimony. * * *

"The mere fact that the infection in decedent's thumb resulting from the sliver could have been a possible contributing cause of his death, does not alone warrant a finding that it was. * * * There must be created in the mind of the trier something more than a possibility, suspicion or surmise that such was the cause, and the inference from the facts proved must be at least the more probable hypothesis, with reference to the possibility of other hypotheses. * * *

"The Commissioner recognized that the cause of death was obscure, that expert medical testimony could alone lay a foundation for his award, and that the testimony of the doctor that the infection from the sliver could have been a possible contributing cause of death, without more, was not enough to support an award. But by taking into consideration all of the evidence, not only the expect testimony but also all the circumstances of the case as shown by the evidence, he concluded that he was justified in finding that the sliver was the cause of death.

"Since expert evidence that an accident can or cannot cause a certain result may affect the conclusion to be reached * * *, it follows that in the case of injuries so naturally and directly connected with the accident that proof of causation does not depend upon expert evidence, medical testimony of 'possibility' may corroborate the other testimony. But unless the facts, outside such medical testimony, fairly warrant the conclusion that the injury resulted from the accident, causation is not established. * * * A possible cause cannot be accepted as the operating cause unless the evidence excludes all other causes

> or shows something in direct connection with the occurrence. * * *"

In concluding its opinion, the court said:

> "In spite of the decedent's good health so soon before his death, a layman of average intelligence, from his own knowledge and experience, could have no well-grounded knowledge that the sliver was the cause of death. Although told that the sliver might have caused the fatal illness, the trier could only speculate as to whether it did or not."

To the same effect see *Cutler v. Bergen Etc. Co.*, 25 Atl.(2d) 75 (Penn.).

As in the *Burton* case, Deputy Commissioner Gray, who conducted the original hearing in this matter, and was the only one to face the various witnesses, recognized that the cause of the cerebral thrombosis was obscure, and that expert medical testimony could alone lay a foundation for an award, when he said that the situation involved "purely a medical question," and that "I can only determine it on the basis of the advice that the doctors give to me" (Tr. 116).

The *Burton* case is also similar to the case at bar not only because it involved the same subsequent ailment, *viz.*, cerebral thrombosis, but also because the Commissioner felt that while the medical testimony was insufficient of itself, he was justified, by taking into consideration all of the circumstances of the case, in finding that the original accident was the cause of death. In other words, the Commissioner there, as the Deputy Commissioner in the instant case, permitted sequence of events to supply the necessary proof of causation in a case where a layman of aver-

age intelligence could have no well-grounded knowledge on the particular ailment in question.

In 32 C.J.S., p. 1127, Sec. 1042, the author, speaking on the subject of causation, says:

> "The mere fact that one event follows another in time does not establish a causal relationship between them."

Cited in support thereof is *Bussmann Mfg. Co. v. National Labor Relations Board*, 111 F.(2d) 783 (8th Cir. 1940), where the court said, at page 787:

> "Proof of mere sequence is not sufficient to establish consequence or causal sequence. A post *hoc ergo proper* hoc is sound neither in logic nor in law."

As an illustration, the 32 C.J.S., p. 1127 cites *Traders & General Ins. v. Cole*, 108 S.W.(2d) 864 (Tex.), holding that proof that a person was sane prior to accident and that at some time after the accident he become insane, did not, in the absence of evidence that the accident was the cause of the insanity, constitute proof that insanity was the result of the accident.

The *Burton* case presented a stronger case from a medical standpoint than that presented in the case at bar, since the doctor there went so far as to say that the infection could have been a "possible contributing cause" of the thrombosis. In the instant case, there is not even that opinion expressed by any of the doctors. The strongest admission made by any of the doctors came from Dr. Cloward, who in answer to Deputy Commissioner Gray's question as to whether there was a "strong possibility" that the accident did have something to do with the subsequent disability, answered:

> "I wouldn't say there was a strong possibility. I think it is very slight." (Tr. 117)

CONCLUSION

The Deputy Commissioner who entered the order complained of herein had only the cold record upon which to predicate his findings. This is not a case where he could from his own observation of the claimant, arrive at his own conclusions. Instead the case presented a "purely medical question." After reading the record, he chose to disregard entirely the only true probative evidence in the case, given by men of science, who were the only persons qualified to pass on such a highly complicated medical question. As stated in *Pacific Employers Ins. Co. v. Ind. Acc. Comm.*, 118 P.(2d) 334 (Cal. 1941), this probably was within his province, but by disregarding the medical evidence the record was thereby devoid of the only competent evidence bearing on the question of cause and effect. In so doing, the Deputy Commissioner entered the field of speculation and conjecture. The award entered by him, being based on speculation and conjecture, rather than upon "substantial evidence" is therefore "not in accordance with law." The compensation order of the Deputy Commissioner should therefore be annulled, set aside and held for naught, and the Judgment of the District Court granting Appellees' Motion for Dismissal of Appellants' Complaint for Mandatory Injunction should be reversed.

Respectfully submitted,

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No. 10995

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

CONTRACTORS, PACIFIC NAVAL AIR BASES, an Association, and LIBERTY MUTUAL INSURANCE COMPANY, a Corporation,

Appellants,

vs.

WM. A. MARSHALL, Deputy Commissioner of the United States Employees' Compensation Commission for the Fourteenth District and JOHN B. PIATT,

Appellees.

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION.

HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEES

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HONORABLE JOHN C. BOWEN, *Judge*

BRIEF OF APPELLEES

STATEMENT OF THE CASE

This is an appeal from an order of the United States District Court for the Western District of Washington, Northern Division, Honorable John C. Bowen, District Judge, dismissing the petition of Contractors, PNAB, to set aside the award of compensation filed on November 29, 1943, by Deputy Commissioner William A. Marshall, one of the appellees herein, in favor of John B. Piatt on account of disability resulting from injuries sustained on December 1, 1942, while employed in the Territory of Hawaii

by appellant Contractors, PNAB, hereinafter referred to as the employer. The other appellant, Liberty Mutual Insurance Company, hereinafter referred to as the carrier, was the insurance carrier of the compensation liability of the employer. The compensation award was made pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act of March 4, 1927, 44 Stat. 1424 (33 U.S.C. 901, *et seq.*) as made applicable to persons employed at certain defense base areas and other places by the Act of August 16, 1941, 55 Stat. 622 (42 U.S.C. 1651-1654).

On December 1, 1942, Piatt was seated at his desk when an electric light reflector shade fell from the ceiling and struck him on the head. Piatt was assisted to the first aid station where those who were caring for him had him lie down and placed an ice-pack on his back and head. He was told to go home and lie down for 24 hours, which he did. On December 3, 1942, he was picked up in an automobile and taken to his office for an important conference but could not continue with the meeting because of his condition. The same day the doctor ordered him to the hospital where he remained until December 24, 1942, when he was brought home in an ambulance. From January 12, 1943, to February 26, 1943, he performed light duties at the office in an advisory

capacity for a few hours a day. He was very tired, had severe headaches, and felt dizzy. Finally on February 26, 1943, while getting ready to go to work, Piatt collapsed in the bathroom of his home and was again taken to the hospital. His condition was diagnosed as cerebral thrombosis, which had paralyzed his left side.

Piatt filed claim for compensation. The employer and the carrier denied the claim upon the sole ground that the cerebral thrombosis was not related to the injury of December 1, 1942. Hearings were held before the deputy commissioner on June 2, 1943 and June 30, 1943. Both sides offered evidence with respect to the issue controverted. Upon the evidence thus adduced before him the deputy commissioner on November 29, 1943 filed the compensation order complained of (R. 9), whereby he found that Piatt was disabled as the result of the injury of December 1, 1942.

The employer and carrier thereupon instituted a proceeding to review the compensation order pursuant to the provisions of section 21 (b) of the Longshoremen's Act (33 U.S.C. 921 (b)). They alleged, in substance, that the compensation order is not in accordance with law because there was no evidence

that the cerebral thrombosis which became manifest on February 26, 1943, was caused by the injury of December 1, 1942. A motion to dismiss the complaint was filed on behalf of the deputy commissioner. The cause came on for a hearing before the District Judge, who by an order entered on October 20, 1944, granted the motion and dismissed the complaint. The employer and its carrier appeal.

ARGUMENT

I

THE FINDING OF THE DEPUTY COMMISSIONER THAT CLAIMANT WAS DISABLED AS THE RESULT OF HIS INJURY IS SUPPORTED BY EVIDENCE, AND BEING THUS SUPPORTED IS FINAL AND CONCLUSIVE.

A. The Principles of Law Support the Deputy Commissioner's Action

The crux of the appellants' case is (1) that the deputy commissioner did not accept certain medical testimony favorable to appellants in making his findings of fact, and (2) that the *medical testimony* does not support his finding that disability resulted from the injury.

The only conclusion to be drawn from the appellants' contentions is that the deputy commissioner of necessity had to rest his decision on no other basis

than the particular part of the medical testimony which they cite, notwithstanding all of the other direct and circumstantial evidence before him in the case. No rule of law requires the deputy commissioner to base his decision upon the testimony or a part thereof, of any particular witness, whether he be a medical or a lay witness. On the contrary, it is well known that the decision of the deputy commissioner must rest upon the whole body of the evidence, with due appraisal of the probative value of each part of it, as well as upon the proper inferences which are to be drawn from the evidence, giving to circumstantial evidence its due weight.[1]

The action of the deputy commissioner in the present case is supported by (1) the direct and cir-

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[1] It is solely within the province of the deputy commissioner or compensation administrator to determine the credibility of witnesses, and he may accept and believe all or any part of the testimony according to his own sound judgment of its truthfulness and reliability. *Wilson & Co., Inc. v. Locke, deputy commissioner*, 50 F. (2d) 81 (C.C.A. 2, 1931); *Rakowski's case*, 173 N.E. 521, 273 Mass. 363 (1930); *Benjamin v. Rosenberg Bros.*, 167 N.Y.S. 650 (1917), aff'd. 223 N.Y. 569. In considering the evidence the deputy commissioner may give weight to "the common-sense of the situation". *Avignone Freres, Inc. v. Cardillo, deputy commissioner*, 117 F. (2d) 385 (App. D.C., 1940).

cumstantial evidence in the case; (2) the presumption which arises from the following facts, all of which were consistent with the kind of injury which he sustained: (a) the apparent good health of the employee, (b) the sustaining of an injury, (c) the consequent chain of symptoms, illness, headaches, and disability, including his final collapse; and (3) the general presumption in the Longshoremen's Act. These will be discussed in the order given.

(1) The direct and circumstantial evidence, in direct proof of his claim, and as supporting the inference and ultimate conclusion that the disability from paralysis resulted from the cause alleged, is so strong as to leave it hardly likely that a reasonable person would conclude otherwise than did the deputy commissioner.[2] Not only was this conclusion reached by the deputy commissioner, but it is also that of the

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[2] The findings of fact of the deputy commissioner supported by evidence should be regarded as final and conclusive and not subject to judicial review. *Marshall, deputy commissioner v. Pletz*, 317 U.S. 383 (1943); *South Chicago Coal & Dock Co. v. Bassett, deputy commissioner*, 309 U.S. 251 (1940); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Voehl v. Indemnity Insurance Co. of North America*, 288 U.S. 162 (1933); *Jules C. L'Hote v. Crowell, deputy commissioner*, 286 U.S. 528 (1932); *Parker, deputy commissioner v. Motor Boat Sales, Inc.*, 314 U.S. 244

District Judge who independently read the record, for he said (R. 127):

> "In fact, I do not see how one reading this record could come to any conclusion as to the cause of Mr. Piatt's disability other than the one the deputy commissioner came to."

This appraisal of all of the evidence, circumstantial and direct, by the court below and its conclusion thereon, is the fair one and that which appeals strongest to the reason. It is the "common sense of the situation" (*Avignone Freres, Inc. v. Cardillo*, 117 F. (2d) 385; App. D.C. 1940). Here we have the case of an employee in apparent good health prior to the injury, working at a war job which required good health and great vigor. He was struck a blow upon the head, which was diagnosed as concussion of the brain, and from that point on there is a record of a constant and continual succession of illness and symtoms until the day of his final collapse. No inter-

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(1941); See 71. C. J. 1297, Sec. 1268. The findings of fact of the deputy commissioner are presumed to be correct. *Anderson v. Hoage, deputy commissioner*, 70 F. (2d) 773 (App. D.C. 1934); *Luckenbach Steamship Co. v. Norton, deputy commissioner*, 96 F. (2d) 764 (C.C.A. 3, 1938); *Burley Welding Works, Inc. v. Lawson, deputy commissioner*, 141 F. (2d) 964 (C.C.A. 5, 1944).

vening accident was shown. None is alleged. If a fair appraisal is to be made of all of the evidence, these facts and circumstances, here briefly stated but appearing in full in the record, must be weighed as part of the totality of the evidence.

(2) But aside from this direct and circumstantial evidence, there is a presumption arising from the facts themselves which further supports the action of the deputy commissioner. This is the presumption followed in *Wroten v. Woodley Petroleum Co.*, 12 La. App. 348, 124, So. 542 (1929), which holds, in substance, that where a workman in apparent good health sustains injury producing immediate symptoms and disability and these symptoms and disability continue thereafter, there arises a presumption that the subsequent disability, if consistent with the kind of injury sustained, did in fact result from the injury. In the present case the ultimate result was consistent with the kind of injury sustained.[3] It was definitely not consistent with some other kind of injury. This presumption is very similar to the general "presump-

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[3] Logical deductions and inferences which may be and are drawn by the deputy commissioner from the evidence are the equivalent of established facts and are not judicially reviewable: *Liberty Mutual Insurance Co. v. Gray, deputy commissioner*, 137 F. (2d) 926 (C.C.A. 9, 1943); *Michigan Transit Cor-*

tion of continuity" of the existence of a given state of facts, or a condition, which the courts frequently rely upon.

(3) There is, finally, the general presumption in the Longshoremen's Act (33 U.S.C. 920) that the claim comes within the provisions of the Act.[4] Here, the testimony of the claimant, Piatt, with that of his wife and of the other witnesses constituting a narra-

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poration v. Brown, deputy commissioner, 56 F. (2d) 200 (D.C. Mich., 1929); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Eastern Steamship Lines, Inc. v. Monahan, deputy commissioner*, 21 F. Supp. 535 (D.C. Me., 1937); *Grain Handling Co., Inc. v. McManigal, deputy commissioner*, 23 F. Supp. 748 (W.D.N.Y., 1938); *Simmons v. Marshall, deputy commissioner*, 94 F. (2d) 850 (C.C.A. 9, 1938); *Lowe, deputy commissioner v. Central R.R. Co.*, 113 F. (2d) 413 (C.C.A. 3, 1940); *Parker, deputy commissioner v. Motor Boat Sales, Inc.*, 314 U. S. 244 (1941); *Contractors, PNAB. v. Pillsbury, deputy commissioner*, F. (2d) (C.C.A. 9, No. 10,950, June 22, 1945).

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[4] The Longshoremen's Act should be liberally construed in favor of the injured employee or his dependent family. *Baltimore & Philadelphia Steamboat Co. v. Norton, deputy commissioner*, 284 U.S. 408 (1932); *Fidelity & Casualty Co. v. Burris*, 59 F. (2d) 1042 (App. D.C. 1932); *Associated General Contractors v. Cardillo, deputy commissioner*, 106 F. (2d) 327 (App. D.C., 1939); *DeWald v. Baltimore & Ohio R.R. Co.*, 71 F. (2d) 810 (C.C.A. 4, 1934), cert. den. 293 U.S. 581.

tion of all the facts and circumstances, together with the permissible inferences which the evidence supports, of itself established a *prima facie* case for the claimant.[5]

A *prima facie* case having been thus established, the burden of proof shifted to the employer. This burden, as spelled out under the Act, was to establish, if it could, by "substantial evidence to the contrary" (33 U.S.C. 920), that the claim did not come within the provisions of the Act.[6] What was this "substantial" evidence to the contrary which respondents submitted? It certainly was not any evidence relating to the fact and circumstances of the injury, or to the fact of subsequent disabilitity and illness as

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[5] Notwithstanding sharp conflict in the evidence on question of disability, the injured employee's testimony alone is sufficient to sustain an award in his favor. *Independent Pier Co. v. Norton, deputy commissioner*, 54 F. (2d) 734 (C.C.A. 3, 1931).

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[6] The burden is on the plaintiff to show that there was no evidence before the deputy commissioner to support the compensation order complained of in the bill. *Grant v. Marshall, deputy commissioner*, 56 F. (2d) 654 (W.D. Wash. 1931); *United Employees Casualty Co. v. Summerous*, 151 S. W. (2d) 247 (Tex. 1941); *Nelson v. Marshall, deputy commissioner*, 56 F. (2d) 654 (W. D. Wash. 1931); *Gulf Oil Corporation v. McManigal, deputy commissioner*, 49 F. Supp. 75 (N.D. W. Va. 1943).

related by the claimant and the other witnesses, because that part of the case was not disputed. The only evidence to the contrary which the employer has to rely upon is that part of the medical testimony consisting of medical opinion. Considering the nature of the injury and the disability suffered by the claimant, unequivocal proof that all of his disability was not caused by the injury could not be of a demonstrable nature.

This is clear from the medical opinion itself. This factor has a definite bearing upon the "substantial" quality of the employer's "evidence to the contrary". It is not possible for the physicians to see the pathological condition, while this patient is alive. Moreover, if physicians could see the pathology they would still have to theorize upon the cause, — and theories of causation in medical science are not notable for their infallibility. The medical opinion must of necessity rest in a large measure on hypotheses, and as hypotheses in medicine go they are frequently subject to vagaries because of the very uncertainties in the science itself.

In the present case there of necessity had to be two hypotheses: (1) as to the *direct* cause of the paralysis, and (2) as to the *indirect* cause which operated to make the paralysis possible. The causes of

the end result (paralysis) being beyond observation, a physician in the present case would be safe in his hypotheses, either way, in respect to the mediate and immediate causes of the paralysis. But such hypotheses of the physicians need not rest upon that belief-to-moral-certainty which the deputy commissioner must have before he can decide a case, either way. Therefore, in appraising the value of evidence, medical opinion on so illusive a subject should not *necessarily* outweigh the cogency of the contemporary facts and the appeal to reason of those facts, nor operate to deprive the claimant of the right to the benefit of any doubt, — a right to which he is entitled under the decisions requiring liberality in the application of workmen's compensation law. To hold otherwise would place claimants in the ultimate power of medical witness, as to the disposition of their claims, as the deputy commissioner could not do otherwise than find according to the medical opinion. Thus the physician would be the ultimate arbiter of the facts.

As the direct and circumstantial evidence in the case is sufficient to cause a reasonable person to conclude (as did both the deputy commissioner and the court below) that the final disability resulted from the original cause, and this in turn is reinforced by the presumption of law in the Longshoremen's Act,

and by the presumption arising from the facts (as stated in the *Wroten* case), the "substantial-evidence-to-the-contrary" burden of the employer required the production of evidence of greater probative value to give it the quality "substantial". It may be noted that the medical opinion was not expressed so as to deny the fact of causal relationship on the ground that the ultimate condition of the claimant (paralysis) *could not have* resulted from the injury. In other words, the medical opinion was not to the effect that the subsequent disability is *not* of a nature consistent with that which might be expected to result from such a concussion or head injury. If it had been, the medical opinion would have had more substance or worth. And as affecting the value of such medical opinion as there was, it is here emphasized that such opinion was based in part on a misapprehension of the facts. Dr. Cloward testified that medical practitioners could not say positively one way or the other that the injury to the claimant's head caused his paralysis (R. 110, 115). This is certainly not "substantial evidence to the contrary", but shows the tenuousness of the medical hypotheses. Furthermore, the physician disclaimed *knowledge* one way or the other of causal relationship when he testified "*I don't know whether a person could say that plugging up* [which

caused paralysis] *was due to the blow he got on the head three months ago or not.*" (R. 115). If he does not know, *he can not deny the fact.*

This is not a case where there had been an injury with absence of any related train of symptoms, and then some time later the occurrence of pathology, the relationship of which to the injury is not apparent, or which has every appearance of remoteness where the only evidence upon which to go forward may be medical opinion. But because such evidence may be vital in such a case does not mean that medical opinion evidence as such, is necessary to support an award or is controlling where, as in the case at bar, there is other evidence to establish the nexus between injury, illness, and eventual disability.

A considerable portion of Appellants' brief is spent in attempting to show that the findings must be supported by "substantial" evidence and that in the present case no finding in respect to causal relationship can be so supported unless it be by expert medical testimony, because the subject is "highly complicated". The Supreme Court has too often considered the rule applicable to findings of fact under the *Longshoremen's Act* to leave the rule in any doubt. None of the Court's decisions specify that such findings shall be supported by "substantial evidence";

many enunciate the necessity that findings of fact must be "supported by evidence", and rule that if they be, they are final. *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251 (1940); *Davis v. Dept. of Labor*, 317 U.S. 249, 256 (1943); *Norton v. Warner*, 321 U.S. 565, 568 (1944); *Del Vecchio v. Bowers*, 296 U.S. 280 (1935); *Voehl v. Indemnity Ins. Co.*, 288 U.S. 162 (1933).

Here at issue is the weight of medical opinion testimony. The *Davis* case, *supra*, involved the far more carefully defined and restricted issue of jurisdiction. That decision quotes the *Longshoremen's Act* statutory presumption that as to any claim made thereunder it is to be "presumed, in the absence of *substantial* evidence to the contrary" (33 U.S.C. 920; italics added), that such claim comes within the Act, and, significantly, omits the qualifying "substantial" as it continues (317 U.S. 249, 256-7):

> "Findings of fact of the agency [U. S. Compensation Commission through its deputy commissioners], where supported by the evidence, are made final. Their conclusion that a case falls within the federal jurisdiction is therefore entitled to great weight and will be rejected only in case of apparent error."

The Supreme Court cases cited by appellants in this connection deal with statutory provisions not to

be found in the Longshoremen's Act and with an entirely different kind of law.[7] "Supported by evidence" is substantial enough in its own right. This statute "aims at 'sure and certain relief for workmen' " (the *Davis* case, *supra*, 317 U.S. at p. 254), and the language of each statute " 'must be read in the light of the mischief to be corrected and the end to be attained'." *South Chicago Coal & Dock Co. v. Bassett*, 309 U.S. 251, 259 (1940).

The deputy commissioner had to consider the credibility of the witnesses and had to weigh conflicting evidence, part of it relating to the fact of the injury and the chain of events which followed, the other part of it relating to the medical testimony. The rule has been repeatedly stated by the Supreme Court that in judicial review of cases arising under the Long-

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[7] The rights, remedies and procedure under the Longshoremen's Act are governed exclusively by that statute. *Associated Indemnity Corp. v. Marshall, deputy commissioner*, 71 F. (2d) 235 (C.C.A. 9, 1934); *Shugard v. Hoage, deputy commissioner*, 89 F. (2d) 796 (App. D.C., 1937); *Luyk v. Hertel*, 242 Mich. 445, 219 N.W. 721 (1928); *Texas Indemnity Ins. Co. v. Pemberton*, 9 S.W. (2d) 65 (Tex. 1928); *Nierman v. Industrial Comm.*, 329 Ill. 623, 161 N. E. 115 (1928); *Town of Albion v. Industrial Commission*, 202 Wis. 15, 231 N.W. 249 (1930). Compare *Bassett, deputy commissioner v. Massman Construction Company*, 120 F. (2d) 230 (C.C.A. 8, 1941), cert. den. 314 U. S. 648.

shoremen's Act, the courts will not reweigh the evidence to determine where the preponderance thereof lies.[8] In weighing this evidence the deputy commissioner had to apply the presumptions above mentioned.

B. The Findings of Fact Are Fully Supported by Evidence

The following is a reference to testimony taken at the hearings before the deputy commissioner sufficient to show that the complained of findings of fact of the deputy commissioner are supported by evidence.

John B. Piatt, claimant, testified as follows: That he was employed by Contractors, PNAB, on December 1, 1942, as Procurement Agent for the Naval Construction Battalion (R. 17); that on that day, while seated at his desk, a reflector shade from the

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[8] Even if the evidence permits conflicting inferences, the inference drawn by the deputy commissioner is not subject to review and will not be reweighed: *South Chicago Coal & Dock Co. v. Bassett, deputy commissioner,* 309 U.S. 251 (1940); *Parker, deputy commissioner v. Motor Boat Sales, Inc.,* 314 U.S. 244 (1941); *Liberty Mutual Insurance Co. v. Gray, deputy commissioner,* 137 F. (2d) 926 (C.C.A. 9, 1943); *Lowe, deputy commissioner, v. Central R.R. Co.,* 113 F. (2d) 413 (C.C.A. 3, 1940); *Henderson, deputy commissioner v. Pate Stevedoring Co., Inc.,* 134 F. (2d) 440 (C.C.A. 5, 1943).

lamp above him fell and hit him on the head; that he stopped work and was helped to the first aid station by two of his assistants where they had him lie down, placing an ice-pack on his back and on his head, and they gave him some medicine; that he was then taken by car to Dr. Stewart of the Medical Center; that he had received a cut on the upper forehead and his scalp, which Dr. Stewart treated and painted; that he was told to go home and to keep quiet for 24 hours, which he did (R. 19, 20); that on the morning of December 3, he was picked up by automobile at his home and was taken to his office for an important conference; that he became dizzy at the meeting, felt very ill, and finally stated that he could stand it no longer, that he was going to get checked over by someone who knew something about head injury, and that he was going to see Dr. Cloward to find out what was the matter with him (R. 21); that he went to Dr. Cloward's office but the latter was not in; that the nurse told him to go home and she would have the doctor call; that he went home immediately and then Dr. Cloward ordered him to go directly to the hospital; that he was admitted to the hospital on December 3, and remained there until December 24, during all of which time he was a bed patient (R. 22, 23); that during January 1943, after he had been home from the hos-

pital about a week, he was taken in an automobile to see Dr. Cloward for a checkup; that from January 12, 1943, to February 27, (sic) 1943, he performed duties in an advisory capacity but became tired very quickly while working and could not remain at work more than about three hours a day; that he was under medical observation during the entire period and was being examined by Dr. Cloward once or twice a week; that Dr. Cloward said that he might go to the office as long as he did not overdo it.

Piatt further testified that he was born in 1888 (R. 24, 25); that he had been employed by Contractors, PNAB, since December 1939; that he had no lengthy periods of disability resulting from any disease except in 1937, when he had pneumonia for about 6 weeks (R. 26); (a report of examination made in 1935 from his own physician and received in evidence by agreement showed claimant's blood pressure to be 118/80) (R. 31); that he had had a physical examination for life insurance in 1929; that a $20,000 health policy was issued to him at that time (R. 32); that Dr. Cloward had an electrocardiograph and report on the heart, made by Dr. Gotshalk, when Dr. Cloward treated Piatt following the injury of December 1, 1942; that this was during the time Piatt was away from work and Dr. Cloward made a check-

up, saying: "You are o.k." (R. 33, 34); that on Piatt's discharge from the hospital he had headaches and the sensation of a tight band across the top and in the rear of the head, and felt weak (R. 35); that after the accident he was dizzy, but felt all right while he was lying down, becoming dizzy when he raised his head; *that during the first week after he left the hospital he had a continuous headache and recurrently thereafter every day up to the day of his collapse on February 26* (R. 36, 37); that on February 26, he arose and went into the bathroom to get ready to go to work, and while standing at the wash basin, he had to seize the basin to support himself; that he felt his knees sag and could not stand up; that he tried to call his wife, but could not speak and slumped to the floor where she found him; that on his admission to the hospital on the same day, the nurse took his blood pressure, looked at it "quick, sort of excited", then took it a second time and a third time; that his recollection is that his blood pressure was 240 (R. 38).

Mrs. Freda F. Piatt, claimant's wife, testified as follows: That on December 1, 1942, her husband came home around 11 o'clock and said he had been hit on the head; that he had never been ill, except with pneumonia (R. 41); that after his injury, as soon as he tried to work, after two or three hours at work he

would get very tired and his employers provided a driver and car for him; that he went to bed as soon as he got home and stayed there; that he wondered what was the matter with his head; that on February 26, 1943, about 6:20 in the morning, she called to him asking him if he was ready, but he made no reply, so she went to see and found him on the floor; that he appeared to have a stroke and could not move his left leg; that she got blankets and a pillow for him and she called Dr. Cloward who directed that her husband go to the hospital in an ambulance.

Mrs. Piatt further testified that it was about 54 hours from the time of the accident to her husband until Dr. Cloward sent her husband to the hospital to stay in bed, whereas during the intervening period her husband had been up and around (R. 42 to 44); that when, on or about December 12 she called at the hospital to see her husband, she inquired as to the possibility of his being returned home and Dr. Cloward advised that her husband could probably go home about the fourteenth day, but when her husband sat up his temperature went to 101 and he was ordered back to bed and kept there until December 26 (R. 68, 69); that the reason given by Dr. Cloward, the attending physician, was that the blood clot evidently was not eradicated or dissolved (R. 70); that

she was told by Dr. Cloward that her husband could not come home until the blood clot was dissolved (R. 71).

George L. Youmans testified as follows: That he is a member of the operating committee of Contractors, PNAB; that claimant, Piatt, worked under Youmans' supervision; that on the day that claimant came to attend the conference after his injury, he told the witness that he could not remain any longer, but had to return home (R. 45, 47); that when claimant returned to work after his first hospitalization he told the witness that he thought he could report for work perhaps three or four hours a day, to help out as he could, but would have to return home after such period; that he did so until the latter part of February when he had a further attack; that the witness considered the claimant an ill man who was getting up and attempting to help out to keep the program running although the witness knew that claimant was under physical and mental stress as the result of his injury (R. 48, 49).

Commander Howard P. Potter testified as follows: That he is a Commander, Civil Engineers' Corps, United States Naval Reserve, and was stationed at Hawaii in December 1942; that his work brought him in frequent contact with the claimant,

Piatt; that Piatt's duties required him to be vigorous and healthy (R. 49, 50); that before the accident of December 1, 1942, he appeared to have limitless energy; that at the conference which he attended shortly after his injury he exhibited signs of fatigue, tiredness, and mental anxiety; that the conference adjourned earlier than was intended because he was in distress; that there was marked change in his mental alertness; that he put his hand to his head frequently as if it were hurting him (R. 51, 52); that after the injury there was a difference in his ability to grasp situations and in his ability to remember details (R. 53-55).

Arden Walter Morgan testified as follows: That he was employed by Contractors, PNAB, and was claimant's principal assistant (R. 56); that the witness was called into the office on the morning of the accident and saw the light globe scattered about the floor, and noted that the claimant was quite dazed; that the height of the ceiling from which the globe fell was approximately ten feet and the globe was within two or three inches of the ceiling (R. 57); that the globe weighed three or four pounds (R. 58); that the witness helped take claimant across the street to the first aid station; that there was a cut on claimant's head which was bleeding and he appeared dazed and

reeled several times, staggering very much while crossing the street (R. 60, 61); that the witness had never worked with a man who had showed more energy than claimant prior to his injury (R. 62); that after the injury he was not the same as he had been before; that he was not as sharp in his work and tired very easily (R. 63); that he complained of continual headaches; that his associates avoided concerning the claimant with details after the injury (R. 64).

Dr. Ralph B. Cloward testified in part as follows: That *his first examination of claimant* after the injury was on December 3, 1942, *two days after the accident;* that it disclosed that claimant was in an extremely nervous state, was trembling and perspiring profusely, and that his voice quivered; that the claimant gave the history of having been struck on the head by a large chandelier while sitting at a desk; that the most striking thing about the examination was the extremely high blood pressure; that the witness made a tentative diagnosis of concussion of brain (R. 98, 99).

Dr. Cloward further testified that he could not say positively one way or another that the injury to claimant's head caused his paralysis (R. 110); that the witness did not think any neurologist could say

positively that an injury to the head might not in some way be related to subsequent changes that went on in the brain (R. 115); that he did not know whether or not a person could say that the plugging up of the artery in the brain was due to the blow on the head three months before (R. 115), but that in his opinion there would be no relation between the two (R. 117); that paralysis can come on quickly or slowly and progressively (R.111).

In forming his opinion that there was no causal relationship between the blow on the head and the subsequent paralysis, Dr. Cloward *assumed as a fact that claimant was "perfectly well" in the intervening period between his two periods of hospitalization and that the paralysis developed "out of a clear sky"* (R. 112). He also accepted as a fact that claimant "didn't complain of headaches, appreciable dizzy spells, or things of that sort" (R. 114) and he referred to claimant's injury as a "scratch on the head" (R. 107). However, the hospital records (Employer's and Carrier's Exhibit A, Part I) show that during the period December 3 to 24 when claimant was first in the hospital, he had headaches on December 3, 4, 6, 7, 10, 11, 18, 19, 20, 21 and 23. After his discharge from the hospital on December 24, 1942, and up to the time of his paralysis, February 26, 1943, the evi-

dence shows a history of continual headaches, weakness and dizziness (R. 24, 35, 36, 37, 42, 47, 49, 51, 52, 54, 63, 64).

Dr. Brown and Dr. Falconer examined claimant upon his return to the United States at the request of the employer and insurance carrier. They stated that in their opinion there was no causal relation between the injury of December 1, 1942, and the cerebral thrombosis of February 26, 1943. But both opinions were based upon several matters of misinformation: for example, Dr. Brown stated that claimant's blood pressure, upon admission to the hospital two days after his first injury, was 240/110, whereas it was 230/140 (see Carrier's Exhibit A, Part I, "Temperature, Pulse and Respiration Chart"); Dr. Brown's opinion is further based upon the erroneous impression that claimant, upon his return to work "was feeling fairly well," whereas the testimony of claimant, his wife and his associates discloses just the opposite situation. This phyician's opinion was also based upon the inaccurate understanding that claimant's blood pressure upon admission to the hospital the second time was 200, whereas the hospital records (Carrier's Exhibit A, Part II, "Neurological Examination on Admission") shows that the blood pressure was only 170/110.

Dr. Falconer's opinion was also based upon misinformation: he stated that claimant's blood pressure during his *first period* of hospitalization was 170 to 190, whereas the hospital records (Carrier's Exhibit A, Part I) show that it ranged from 230 on December 3, to 140 on December 17; also, he states that claimant's blood pressure on admission to the hospital on February 26 was 200 whereas the hospital records (Employer's Exhibit A, Part II) show that his blood pressure was 170/110 on February 26th. An additional error in Dr. Falconer's assumptions is that he states the claimant was discharged from the hospital on March 27, 1943, whereas he was discharged on May 5, 1943.

It is believed that the evidence above narrated discloses unmistakenly a situation of *continuing disability* from the time claimant received the blow to his head on December 1, 1942, until he became totally disabled on February 26, 1943. During that entire period claimant was either seeking to recuperate at home, was in the hospital, or was working only part of the day, — all such inactivity being plainly and directly the result of his injury. As the court below stated, it is difficult to see how anyone reading the record could come to any conclusion as to the cause

of claimant's disability other than the one to which the deputy commissioner came.

C. Medical Testimony Was Not Necessary

The decided cases show medical testimony is not necessary to establish causal connection. When an accident results in immediate injury and disability, such as head injury, and there then ensues a series of related complaints, such as headaches and dizziness of a substantially continuous nature, persisting until the employee is obliged to stop work, the causal connection between the injury and the disability which follows does not have to be established exclusively by testimony of professional witnesses; it may equally be established by *other competent evidence, circumstantial and direct.* In addition — where a workman in apparent good health sustains an injury which produces immediate symptoms and disability, illness or pain, with related symptoms which continue thereafter, there arises a *presumption* that the subsequent disability (where it is of a nature consistent with that which may result from such an injury) did in fact result therefrom. *Wroten v. Woodley Petroleum Co.*, 12 La. App. 348, 124 So. 542 (1929); compare *Jarka Corporation v. Norton, deputy commissioner,* 56 F. (2d) 287 (E.D. Pa., 1930), where the court said:

" * * * I am unwilling to hold that a claimant, in order to establish a case for compensation, must produce expert medical testimony to substantiate his claim, where it is proved that he sustained a fracture of the back and is now unable to work, and where the disability, not having existed before the injury, has been more or less *continuous since the injury.* I am also unwilling to hold that the commissioner is bound to accept the opinion of a medical expert for a respondent merely because uncontradicted. It seems to me that to sustain his contention that the award is not in accordance with law would require the court to adopt either of the foregoing rules." (Italics supplied).[9]

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[9] As to the effect of *circumstances* outweighing and disposing of a *physician's expressed opinion*, the Supreme Court of Kansas in *Dinoni v. Vulcan Coal Co.*, 132 Kans. 810, 297 P. 721, said (from syllabus by the Court): "When all the facts and circumstances of an injury, its treatment, changes, and results, are before the compensation commissioner, and later before the district court, and also the opinion of a physician, *the latter can not be said to be the undisputed evidence in the case, if the facts and circumstances reasonably tend to show or indicate a different conclusion from that expressed in his opinion.*" (Italics supplied).

To the same effect is *Utah Delaware Min. Co. v. Ind. Commission*, 76 Utah 187, 289 P. 94, (1930), wherein the court said: "Notwithstanding the opinion expressed by the attending physician — it was but an opinion — that he saw no connection between the present disabilities of the applicant and the injuries sustained by him at the time of the accident, nevertheless the commission had before it sufficient evidence to justify a finding that the disabilities were attribu-

While there was medical opinion to the effect that the disability directly attributable to cerebral thrombosis was not caused by the accident, the opinion was not based upon the correct factual situation in the case, as shown in the record. Moreover, the deputy commissioner is not bound to accept the opinion or theory of any particular medical examiner. He may rely upon his own observation and judgment in conjunction with the evidence: *Contractors, PNAB, v.*

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table to the accident. The nature and extent of the injuries occasioned by the accident and the parts of the body injured and affected, and the physical condition of the applicant thereafter from the time of the accident until the hearing, were all fully described and laid before the commission. Whether the present disabilities were or were not attributable to the injuries received at the time of the accident, constituted the ultimate fact or question to be determined by the commission. They were not bound to accept a mere opinion of an expert on such an ultimate question, unless such was the only reasonable conclusion to reach in the premises. * * * The applicant, prior to the accident, having been healthy and able-bodied and having no prior kidney or bladder trouble and no sickness of any kind, and receiving a rather severe injury in the region of the kidney, together with evidence that he thereafter almost continually suffered and complained of pain in that region, and not anything to show that the diseased and infectious conditions were attributable to another cause, the natural cause to which they may be attributable is the injury received at the time of the accident. We thus think the evidence sufficient to support the findings in such respect."

Pillsbury, deputy commissioner, ... F. (2d) .... (C.C.A. *9*, No. 10,950, June 22, 1945).[10] In *Southern Steamship Co. v. Norton, deputy commissioner*, 41 F. Supp. 108 (E.D. Pa. 1941) Aff'd. 128 F. (2d) 263 (C.C.A. 3, 1942), the court said:

> "The medical testimony was no stronger in the Di Giorgio case than in the case at bar. There, as here, no physician positively established a causal relation between the accident and the injury; *nor was there any medical testimony even that the accident probably caused the injury.* One physician said it was a doubtful case: the physicians in general could not conclude definitely that the accident was the cause of the cataractous condition. Obviously, the Deputy Commissioner in the Di Giorgio case reached his conclusions that the injury and the cataractous condition did result from the accident from other and nonmedical testimony in the case.

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[10] See also *Liberty Stevedoring Co., Inc. v. Cardillo, deputy commissioner*, 18 F. Supp. 729 (E.D. N.Y., 1937); *Joyce v. United States Deputy Commissioner*, 33 F. (2d) 218 (D.C. Me., 1929); *Jarka Corporation v. Norton, deputy commissioner*, 56 F. (2d) 287 (E.D. Pa., 1930); *E. S. Booth v. Monahan, deputy commissioner*, 56 F. (2d) 168 (D.C. Me., 1930); *Zurich General Accident & Liability Insurance Co. v. Marshall, deputy commissioner*, 42 F. (2d) 1010 (D.C. Wash. 1930); *Baltimore & Ohio R.R. Co. v. Clark, deputy commissioner*, 56 F. (2d) 212 (D.C. Md., 1932); *Ryan Stevedoring Co., Inc. v. Norton, deputy commissioner*, 50 F. Supp. 221 (E.D. Pa. 1943); *Liberty Mutual Ins. Co. v. Marshall, deputy commissioner*, 57 F. Supp. 177 (W.D. Wash. N.D. 1944).

> "I reach the same conclusions in the instant case, to wit, that the absence of medical testimony definitely or positively establishing a causal relation between the accident and the loss of vision does not rob the findings and award of the Deputy Commissioner of validity, provided there is any other testimony to support them. That other testimony is furnished by the employee himself, including the testimony that his vision, good before the accident, was impaired thereafter." (Italics supplied).[11]

In *Frank Marra Co., Inc. v. Norton, deputy commissioner*, 56 F. (2d) 246 (E.D. Pa., 1931), the court said:

> "The further proposition which bears the brunt of the argument is to the effect that the cause of a death is within the peculiar province of expert opinion and that a finding must have as one of its supports the testimony of an expert. It is urged that the finding of the cause of death in this case is without such support, inasmuch as the expert testimony was not that the death was due to injuries received in the course of employment, but merely that it might have been so due. In this view, the death may have resulted from any one or two or more causes, one of which was traumatic. If the testimony of the experts were all the evidence in support of the fact finding made, it is clear that it would give equal support

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[11] *In McNeelly v. Sheppeard, deputy commissioner*, 89 F. (2d) 956 (C.C.A. 5, 1937), which also involved the question of causal relationship between an alleged injury and subsequent death, the court said: "The physician's opinion, while admissible, was not conclusive."

to any one of several different findings. There was, however, other evidence. An acceptance of the argument addressed to us would closely approach the proposition that no finding of a cause of death can be made which does not have the support of expert opinion. This latter proposition we cannot accept. Whenever opinion evidence is admissible, the opinion of an expert is evidence, but it is in itself nothing more. It may be convincing or unconvincing. It may in itself be all sufficient to support a finding, but it does not follow that a finding may not be made without it. To hold otherwise would be to rule in effect that it is not for the fact finding tribunal, but for the experts, to find the cause of death."

In the case of *Ryan Stevedoring Co. v. Norton, deputy commissioner*, 50 F. Supp. 221 (E.D. Pa., 1943), which arose under the Longshoremen's Act, the court said:

"While it is true that the sole medical testimony in the case shows no causal connection between the accident and the disability for which the challenged award of compensation was made, it has been held that such causal connection need not be established by medical testimony, but that the Deputy Commissioner may rely upon his own observation and judgment in conjunction with the evidence. *Southern Steamship Co. v. Norton*, 41 F. Supp. 108, affirmed 128 F. (2d) 263, C.C.A. 3; *Frank Marra Co. v. Norton*, 56 F. (2d) 246. It has further been held that the Deputy Commissioner is not bound by the uncontradicted testimony of medical witnesses where other evidence warrants a different conclusion. *Wood Preserving Corp. v. McManigal*,

39 F. Supp. 177; *Jarka Corp. of Philadelphia v. Norton* 56 F. (2d) 267."[12]

The decisions under the Longshoremen's Act are consistent with the decisions under the various state compensation laws. Thus in *Liberty Mutual Insurance Company v. Williams*, 44 Ga. App. 452, 161 S. E. 853 (1932), the employee sustained an injury to his leg and side on February 20, 1930. On April 8, the attending physician dismissed the employee as being able to return to work, but he was still unable to get about, except by the use of crutches and from then on his condition grew worse so that he was soon confined to bed and continued in a state of illness until his death on May 3, 1930, from a cerebral hemorrhage caused by high blood pressure. The two physician witnesses for the employer testified that there was no causal relationship between the employee's injury and the high blood pressure

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[12] See also *Associated General Contractors v. Cardillo, deputy commissioner*, 106 F. (2d) 327 (App. D.C., 1939), where an award for death from a cerebral hemorrhage which occured a month and a half after the alleged injury was sustained upon medical evidence that the injury could have occured in the manner described and could have caused the condition disclosed by the medical examination. Cf. *Independent Pier Co. v. Norton, deputy commissioner*, 54 F. (2d) 734 (C.C.A. 3, 1931).

and cerebral hemorrhage. The court, in sustaining an award of compensation, stated:

> "The testimony of the physicians as to want of any causal association between the employee's injuries and the cerebral hemorrhage and high blood pressure from which he died was not binding upon the Industrial Commission but the question as to the weight and credit to be given to such testimony was a matter to be determined by the Commission."

In *Kempa v. Pittsburgh Terminal Coal Corporation*, 133 Pa. Super. 392, 3 A. (2d) 34 (1938), the employee, a miner for 30 years, aged 61 years, was injured on March 2, 1936, when he was struck on the head and shoulders by loose coal which fell from the roof rendering him unconscious for a short time, estimated at from two to five minutes. He was taken to the mine doctor who ordered him to return home and go to bed. The next day the doctor directed that ice be put on his head. He returned to work on March 6, 1936, and continued until Labor Day (first Monday in September), when he was compelled to quit due to failing health. The referee made an award of compensation, finding as follows:

> "From a consideration of all the testimony in the case, particularly the fact that claimant suffered a concussion of the brain at the time of

the accident, and the continued complaints of headaches and dizziness thereafter, your Referee is of the opinion and finds as a fact that said claimant is suffering with total disability and that said disability is the result of the injury sustained by him on March 2, 1936."

The court in affirming the compensation award, said:

"There is no doubt that claimant had been steadily employed as a miner until the accident, that there was an accidental injury, and that immediately and directly thereafter total disability, for at least a time, followed.

"Testimony offered upon the part of the claimant was to the effect that after the accident he apparently did not readily comprehend what was said to him, that he was unable to sleep, suffered from severe headaches, dizziness, had trouble with his eyes, and became irritable.

* * * * *

"The connection between the injury, which resulted from a fall of coal that buried claimant to his waist, and the disability which followed was not remote but so direct and natural that an award does not depend solely on the testimony of the professional witnesses; essential facts to support it were established by other competent evidence. (citing cases)

"Taking into consideration all the testimony offered by claimant, we have no difficulty in reaching the conclusion that the granting of the award was fully justified * * * the fact-finding body has a right to use the conclusions and tests of ordinary everyday experience and draw the inferences which reasonable men would thus draw from similar facts."

In *Southern Cement Co. v. Walthall*, 217 Ala. 645, 117 So. 17 (1928), the employee was injured on June 14, 1926, by a blow on the head from a falling beam of timber. He laid off work for several days, went back to work for two days, then quit work entirely and about August 21, 1926, suffered a stroke of apoplexy with paralysis of the left side, from which he died August 31, 1926. An award of compensation was made from which the employer appealed, contending that the death was not causally related to the injury. The court, in affirming the award, said:

> "While the testimony of the two physicians examined on behalf of defendant tends strongly to the conclusion that the deceased workman's death was due to a long-standing and far-advanced condition of arteriosclerosis, which culminated naturally and inevitably in a fatal cerebral hemorrhage, yet there was other testimony which, we think, supports the trial court's finding that the blow or blows on the workman's head proximately caused the fatal hemorrhage about two months afterwards."

Cf. *M. P. Moller Motor Car Co. v. Unger*, 166 Md. 198, 170 A. 777 (1934); *Pierron v. Prudential Insurance Company*, 65 Ohio App. 465, 30 N. E. (2d) 563 (1941).

Appellants, in substance, simply urge that there

is no evidence to support the deputy commissioner's finding that the accident was the "direct and proximate cause" of the cerebral thrombosis. Without delving into the subject of "proximate cause", it is respectfully submitted that (1) an injury which either causes, or concurs with a disease to cause, disability is the proximate cause of the disability;[13] (2) the concept of proximate cause, as it is applied in tort law, is not applicable in the administration of workmen's compensation laws;[14] and (3) the deputy commissioner did not find that the injury was the cause,

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[13] See *Victor Oolotic Stone Co. v. Crider*, 106 Ind. App. 461, 19 N. E. (2d) 478 (1939), where an employee injured by a blow on the head on December 7, 1937 died from meningitis on February 8, 1938; *Texas Indemnity Co. v. Staggs*, 134 Tex. 318, 134 S. W. (2d) 1026 (1940). Where it is intended that the injury, to be compensable, must be the *sole* cause of the disability, it is the rule to so provide in the law. For example, see sec. 301 (c) of the Pennsylvania workmen's compensation statute, which provides in substance that silicosis shall not be considered compensable unless it is the *sole* cause of the disability.

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[14] *Manitowoc Boiler Works v. Industrial Commission*, 165 Wis. 592, 163 N. W. 172, 106 A.L.R. 82 (1917); *Hartford Accident and Indemnity Co. v. Cardillo, deputy commissioner*, 112 F. (2d) 11, 17 (App. D.C. 1940). Cf. Morris, *On the Teaching of Legal Cause* (1939), 39 Col. L. Rev. 1087; *Avignone Freres, Inc. v. Cardillo, deputy commissioner*, 117 F.

proximate or otherwise, of the cerebral thrombosis, or as appellants contend, that the cerebral thrombosis resulted from the injury and was the sole cause of claimant's disability; the deputy commissioner merely found that claimant was disabled as the result of the injury, a finding fully supported by the evidence in its natural and common sense interpretation.

(2d) 385 (App. D.C. 1940); *Texas Indemnity Co. v. Staggs*, 134 Tex. 318, 134 S. W. (2d) 1026 (1940). In *Travelers Insurance Company v. Peters* 14 S. W. (2d) 1007 (Tex. 1929), the court said: "*We are of the opinion that the rule of proximate cause has no application to cases arising under the Workmen's Compensation Act.* The term 'proximate cause' is not used anywhere in the act. A party claiming compensation under such act cannot be compelled to go further than is required by the provisions of the act, either in pleading or proving his cause of action. It is true that there must be established a causal connection between an injury and the death of an employee before a recovery would be authorized. If, however, the injury is shown to be the producing cause of the death, a finding is justified that death was due to the injury, if it arises in the course of and out of the employment. It need not be established that the death was a proximate result of the injury. Snyder's [Schneider] Workmen's Compensation Laws, vol. 2, sec. 523; *Lundy v. George Brown Co.*, 93 N.J. Law, 107, 106 A. 362; *Tanner v. Aluminum Castings Co.*, 210 Mich. 366, 178, N.W. 69; *Krueger v. Hayes Mfg. Co.*, 213 Mich. 218, 181 N.W. 1010; *King v. Buckeye Cotton Oil Co.*, 155 Tenn. 491, 296 S.W. 3, 53 A.L.R. 1086; *Bramble v. Shields*, 146 Md. 494, 127 A. 44; *Anderson v. Industrial Ins. Co.*, 116 Wash. 421, 199 P. 747." (Italics supplied)

Assuming, *arguendo*, that the cerebral thrombosis did not result from the injury but merely added to the disability, the employer and insurance carrier would not be relieved of their liability for the disability existing on February 26, 1943. Where intervening disease or injury which would itself cause disability is superimposed upon the compensable disability then existing, liability for disability from the first cause continues. *Bernatowicz v. Nacirema Operating Co.*, 142 F. (2d) 385 (C.C.A. 3, 1944). In the case just cited, the court quoted from *Bay Ridge Operating Co. v. Lowe, deputy commissioner*, 14 F. Supp. 280 (S.D. N.Y.) stating:

> " 'The act does not say that although the disability continues, payments are to cease *in the event that the employee later also becomes incapacitated from another cause.* If the plaintiff's contention is right, it must be because such a limitation is to be read into the statute and to do this would be contrary to the general policy in dealing with this statute and which should be liberally construed. *Rothschild & Co. v. Marshall* [9 Cir.], 44 F. (2d) 546; *De Wald v. Baltimore & O. R. Co.*, [4 Cir.], 71 F. (2d) 810.
>
> " 'It could not reasonably be contended that if an employee receiving payment for a permanent total or permanent partial disability met with another accident or from some other cause suffered another permanent disability, that the employer could then stop his payment.' " (Italics supplied)

Cf. *Whitehead's Case*, 312 Mass. 611, 45 N. E. (2d) 839 (1943).

It is respectfully submitted that if the Deputy Commissioner had found that claimant's disability resulting from the injury of December 1, 1942, had terminated prior to February 26, 1943, the date of the paralysis, the finding would have been contrary to the uncontradicted evidence of claimant, his wife and all his business associates.[15] As to the period subsequent to February 26, 1943, there is no evidence that the disability resulting from the injury had terminated. All that the physicians testified to — and that upon incorrect factual bases — was that in their opinion the injury of December 1, 1942, did not cause the cerebral thrombosis. They did not state that

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[15] The evidence is uncontradicted that claimant was disabled or continually ill from the time of his injury on December 1, 1942, to the date of his paralysis on February 26, 1943. Disability is defined in the Longshoremen's Act (33 U.S.C. 902 (10)) as the "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment". Although presumably claimant received his pay during the period in which he worked part time, he was disabled within the meaning of the Act. The fact that the employee receives his regular wages after the injury does not mean that he is not disabled. *Twin Harbor Stevedoring & Tug Company v. Marshall,*

claimant was not disabled from the original cause. Thus the gap in their testimony is apparent.

II

APPELLANTS' AUTHORITIES ARE INAPPLICABLE TO THE CASE AT BAR

Appellants rely principally upon the state court cases of *Burton v. Holden & M. Lumber Co.*, 112 Vt. 17, 20 A. (2d) 99 (1941), and *Pacific Employers Ins. Co. v. Industrial Accident Comm.*, 118 P. (2d) 334 (Cal. 1941), as establishing the necessity of medical opinion. Whatever weight these cases may have on the proposition for which cited, there are numerous authorities to the contrary, and furthermore, such cases are distinguishable from the case at bar

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deputy commissioner, 103 F. (2d) 513 (C.C.A. 9, 1939); *Hartford Accident and Indemnity Co. v. Hoage, deputy commissioner*, 85 F. (2d) 420 App. D.C., (1936); *Luckenbach Steamship Co. v. Norton, deputy commissioner*, 96 F. (2d) 764 (C.C.A. 3, 1938); *Roller v. Warren*, 98 Vt. 514, 129 Atl. 168 (1925); *Postal Telegraph-Cable Co. v. Industrial Accident Commission*, 213 Cal. 544, 3 P. (2d) 6 (1931); *Burley Welding Works, Inc. v. Lawson, deputy commissioner*, 141 F. (2d) 964 (C.C.A. 5, 1944). An employee might be paid and receive his full wages although he is able to perform none or only a few of his duties. The concept of payment and receipt of wages and the concept of incapacity and disability to earn wages are not mutually exclusive.

and without application to the facts at hand. The *Burton* case involved the question of causal relation between a *sliver* which the employee got in his *finger* and a cerebral thrombosis. Such a situation is one of those "not apparent" type of cases where no common sense connection can be perceived. In the present case the employee was struck and seriously wounded on the *head*, the same place where his subsequent trouble developed after the continuance of persistent headaches and dizziness in the interval between the accident and the climax, — circumstances entitled to the greatest weight in the appraisal of the evidence. In the *Pacific Employers* case, the question involved was whether an ulcer from which the employee suffered was due to an injury. *The employee there had admitted that she was bothered with ulcers since childhood.* In the present case there was no evidence that the employee had any previous concussion or cerebral thrombosis. On the contrary, the evidence discloses that up to the time of the accident he was a man in excellent condition, robust and energetic physically and mentally.

CONCLUSION

It is respectfully submitted that the order of the Court below dismissing the petition to set aside the deputy commissioner's award was proper and should be affirmed.

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No. 10995

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Appellants,

vs.

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Appellees.

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REPLY BRIEF OF APPELLANTS

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PRELIMINARY STATEMENT

For reply to the brief of appellees, appellants first wish to point out several inaccuracies made in the statement of the case therein:

1. On page 2, the object which fell on claimant is described as an "electric light reflector shade." The record shows, however, that it was a glass composition indirect lighting globe (Tr. 58).

2. On pages 2 and 3, appellees state that claimant from January 12 to February 26, 1943, performed light duties at the office in an advisory capacity "for

a few hours a day." Claimant's testimony, however, was as follows:

> "After the first week I added on a half hour at a time, and a little more, *and the last three days I was out there I did stay practically the full time, the last three days.*"

3. On page 3, appellees state that hearings were held before the "Deputy Commissioner" on June 2 and June 30, 1943, and that, upon the evidence thus adduced, the "Deputy Commissioner" on November 29, 1943, filed his compensation order. The inference from such a statement is that there was only one Deputy Commissioner involved in the case, and that the one who made the order, heard the testimony. Such was not the case, however.

Reply to Appellees' Argument

The crux of appellants' case is not correctly stated by appellees on page 4. Rather, the true crux is

(1) Medical testimony was *necessary* in this case to establish causality; and

(2) The medical testimony introduced does not support the findings.

It is observed that appellees in their brief do not contend that the medical testimony supports the findings. Therefore, appellants consider Point 2, *supra*, to be conceded.

The only issue between the parties before this court, therefore, is Point 1, viz., whether in the type of disability involved herein (cerebral thrombosis), medical testimony was *necessary* to establish causation.

Appellees argue, on page 5, that no rule of law re-

quires the Deputy Commissioner to base his decision upon the testimony of any particular witness, since he is the sole judge of their credibility. We have no quarrel with the statement of the rule as such. Its application to the facts of this case, however, is challenged, since that point is not at issue herein.

In the first place, there is no *conflict* in the medical testimony as such. Nor is there any conflict in the non-medical testimony.

In the second place, the Deputy Commissioner who made the order, did not hear the witnesses, or face any of them. Therefore, how can it be said that he was either in a position to judge the credibility of witnesses, or that he alone has the exclusive province to pass on that issue? If the credibility of any witness is involved herein, this court is in exactly the same position to pass on that question as was the Deputy Commissioner whose order is under attack.

The argument is made on page 6, that the direct and circumstantial evidence is so strong in this case "as to leave it hardly likely that a *reasonable person* would conclude otherwise than did the Deputy Commissioner." The implication in that statement, of course, is that all of the medical experts who concluded "otherwise" are not "reasonable men." In fact, an attempt is made to belittle the opinions of the medical experts, by pointing out certain minor inaccuracies, to show that their opinions were based upon "misinformation." This subject will be discussed at a later point in this brief.

If the "direct and circumstantial" evidence in this case was so strong as to indicate only one conclusion

to a "reasonable person," how can we explain the fact that these same facts did not persuade the experts whose opinions were solicited to aid the Deputy Commissioner in arriving at his conclusion? Granted that two of the experts, Dr. Brown and Dr. Falconer, were of the insurance carrier's choosing, how explain that claimant's own personal physician, whom he selected at the outset, and who attended him during the period of both hospitalizations, stood unconvinced by the so-called direct and circumstantial evidence?

If the "common sense" possessed by laymen is to govern the conclusion to be reached on the medical question involved herein, why was it necessary to go to the trouble of obtaining the opinions of doctors in the first place? Deputy Commissioner Gray certainly did not think that the "common sense of the situation" was sufficient, otherwise, why did he say that he could only determine the question "on the basis of the advice that the doctors" gave to him? (Tr. 116).

On page 7, appellees state that the blow was diagnosed as "concussion of the brain," in order to establish the first link in the "common sense" situation rule. Compare, however, the actual testimony of Dr. Cloward, who described the blow as producing "no very extensive wound," and "no large bump, swelling or bruise or contusion," but only a "scratch." His diagnosis of concussion was "tentative" only, and made purely from the "story" and not from any objective finding (Tr. 99).

Appellees also say that "no intervening accident was shown" However, Dr. Cloward testified that the paralysis was due to an intervening "cerebral vascular

accident," arising separate and apart from the original injury (Tr. 112, 113).

On page 8, appellees argue that since the ultimate result was consistent with the kind of injury sustained, and that, since it was definitely not consistent with some other kind of injury, therefore, the presumption arising from the facts themselves would be sufficient to support the finding. The argument, however, begs the question, for the very point at issue is whether the paralysis was consistent with the type of injury sustained. It is surprising that if it was so simple for a layman to see consistency in the situation, that three eminent specialists could not likewise see the same.

To be consistent, from a medical standpoint, the paralysis would have manifested itself either immediately following the blow, or by a gradual awkwardness of the extremities (Tr. 111). *Claimant had neither manifestation during the intervening period.*

The doctors, at least, not only felt that the paralysis was *inconsistent* with the type of injury sustained, but that it was only *consistent* with a vascular disease and hypertension, entirely unconnected with the minor head injury received nearly three months previously.

Sec. 20 of the Longshoremen's Act (33 U.S.C.A. Sec. 920) is cited by appellees. From that, it is argued that the non-medical testimony spelled out a prima facie case in favor of claimant, and that, therefore, the burden shifted to the employer to establish that the claim did not come within the provisions of the act "by substantial evidence to the contrary." Contrary

to appellees' rather labored argument and tenuous reasoning that the medical testimony did not constitute "substantial evidence to the contrary," it is submitted that if the testimony of claimant's own attending physician, as well as of two other medical experts, is not "substantial evidence to the contrary," then the opinions of doctors based upon physical examination and observation, when made in support of the findings, should likewise be ignored. If they do not constitute substantial evidence in the former, they likewise do not constitute such evidence in the latter case.

It is submitted that the presumption created by Sec. 20 is not sufficient to sustain the award, for in this case, the opinions of the several doctors of non-causal relation is positive, direct and unequivocal, based upon personal observation and examination of the claimant himself. The injection of this argument on presumption is but to play with shadows, and reject substance.

Furthermore, by this reference, appellees are confusing the difference between the procedural burden of going forward with the evidence involved in hearings before the Deputy Commissioner, and that involved in a proceeding to review the order of the Commissioner before the court under Sec. 21(b) of the act. The cases cited by appellees on page 10 under Note 6, involve the latter.

As to proceedings before the Deputy Commissioner, the function of the statutory presumption and the effect thereof is clearly stated in *Indemnity Ins. Co.*

of North America v. Hoage (App. D.C. 1932) 58 F. (2d) 1074, at page 1075, as follows:

> "This statutory presumption, however, furnishes merely a basis for proof and not a substitute therefor. It does not shift the burden of proof from the claimant to prove by *substantial evidence* that the injury arose out of and in the course of his employment. To determine whether or not the Commissioner's conclusions of law are correct, it is necessary for the court to ascertain whether they are supported by sufficient evidence. An order based upon insufficient evidence is an order contrary to law, and to determine this question a review of the evidence becomes essential." (Italics ours)

In other words, in proceedings before the Deputy Commissioner, the presumption that a claim comes within the provisions of the act, disappears as soon as substantial evidence to the contrary is introduced, and the burden of establishing the claim by substantial evidence is then reimposed upon claimant. Upon appeal to the court, the burden is upon the party attacking the order, to show that the findings are not supported by substantial evidence. The burden in the latter case, however, is merely one of *argument*, rather than *proof*, since no additional proof is heard or can be heard by the court.

Little space need be devoted to appellees' argument that "supported by evidence" as used by the Supreme Court in construing the Longshoremen's Act, does not mean "substantial evidence." The fact that any such distinction is attempted to be made, carries with it the implication that the evidence in

this case upon which the Deputy Commissioner based his finding was not "substantial," but merely "evidence."

On page 16, appellees say that the Deputy Commissioner had to consider the "credibility" of the witnesses, and had to weigh "conflicting" evidence. In the first place, as previously pointed out, the Deputy Commissioner faced none of the witnesses, so as to be in a position to judge their credibility from their demeanor, their candor or lack of candor, but had only the written record to predicate his findings upon. In the second place, the case is singularly free of "conflicting" evidence. There was no dispute as to the facts. There was no conflict among the medical experts. The only conflict is in the conclusion reached by a lay member of the United States Employees' Compensation Commission on the one hand, and members of the medical profession, on the other hand, upon what even appellees on page 12 admitted to be an "elusive" medical subject.

In attempting to break down the force of Dr. Cloward's testimony, appellees say on page 25 that he assumed as a fact that claimant was "perfectly well in the intervening period between his two periods of hospitalization, and that the paralysis developed out of a clear sky." The words "perfectly well," as used by Dr. Cloward in one stage of his testimony, should be read in conjunction with his statement immediately following, wherein he said:

> "Between Mr. Piatt's discharge from the hospital and his second admission, from a *neurological* standpoint he was perfectly normal."

His statement that the paralysis developed "out of a clear sky" is certainly accurate, since there is no shred of evidence in the record to show that claimant suffered from any symptoms of paralysis in the intervening period.

Also, on page 25, the statement is made that Dr. Cloward testified that claimant "didn't complain of headaches, appreciable dizzy spells, or things of that sort."

Through inadvertence, undoubtedly, the first comma in the above quotation was misplaced, which gives an entirely different meaning to the testimony. The record does not show any comma after the word "headaches," so as to make the word "appreciable" modify "dizzy spells." Instead, the comma appears after the word "appreciable," so as to qualify the word "headaches." In other words, his testimony was that claimant did not complain to him of appreciable headaches or dizzy spells.

Appellees overstate the record on page 26, when they say the evidence after his discharge from the hospital on December 24, 1942, up to the time of his paralysis on February 26, 1943, "shows a history of continual headaches, weakness and *dizziness*." Reference to each page of the record cited in support of that statement, fails to reveal any mention of "dizziness," except in one instance, on page 36 of the record, which concerned the after-effects immediately following the original blow on December 1 and December 2. There is not one iota of evidence concerning dizzy spells after that date.

The attempt, likewise, is made to discredit the tes-

timony of Dr. Brown and Dr. Falconer, by showing that their opinions were based upon several matters of "misinformation." The inference being that, if these doctors had not been so misinformed, their opinions might have been more favorable.

As we read the opinions of the doctors, they are not predicated upon the vagaries of claimant's blood pressure readings, but upon three essential factors:

(1) The original injury to the head was slight, with no evidence of fracture, and produced no loss of consciousness;

(2) The length of time that elapsed following the blow before paralysis manifested itself for the first time; and

(3) The suddeness of the onset of paralysis without any intervening awkwardness in the use of his extremities.

Whether the blood pressure reading on the first admission to the hospital was 230/140, rather than 240/110, or whether claimant was feeling "*fairly* well" in the interim, or whether claimant's blood pressure upon the second admission to the hospital was 170/110, rather than 200, would certainly not have altered the ultimate conclusion one whit on the part of Dr. Brown.

Likewise, so far as Dr. Falconer is concerned, his opinion would not have been any different if he knew that claimant's blood pressure during the first period of hospitalization was 230 to 140, rather than 170 to 190, or that his blood pressure on the second admission was 170/110, rather than 200, or that claimant was discharged on May 5, 1943, rather than March 27, 1943, since none of these factors would have changed

the fundamental basis upon which his conclusions were based.

On page 27, appellees argue that the record discloses a situation of "continuing disability" during the intervening period. What, may we ask, was the nature of the so-called continuing disability? *It certaing was not in the use and motion of his arms or legs, which was the disability that occurred for the first time on February 26.* Furthermore, claimant returned to work January 12, 1943, and continued until Frebruary 26, 1943, albeit for three hours per day the first week, and thereafter a half hour more each day, until working full time the last three days preceding his collapse. How can it be said, therefore, that he suffered from a "continuing disability" during the entire intervening period?

On page 28, appellees say that "when an accident results in immediate injury and disability, such as head injury, and there then ensues a series of related complaints, such as headaches and *dizziness* of a substantially continuing nature, persisting until the employee is obliged to stop work," medical testimony is not necessary to establish casual connection.

The vice in such an argument is that it assumes facts not present here. In the first place, there was no evidence of *dizziness* suffered by claimant except on the day of his injury and on the day following. In the second place, the headaches, as such, did not oblige the employee to stop work. The event that caused a termination of the employment, was an altogether different type of disability, than that suffered

by claimant from December 1, 1942, to January 12, 1943.

Cited is *Wroten v. Woodley Petroleum Co.* (La. 1929) 124 So. 542. There, the employee injured his side when he fell from a height of eight feet onto a metal object. The fall produced immediate disability, for which the employer paid compensation for a period of about six weeks. The issue involved was whether his subsequent disability was due to the injury, or to arthritis. There were a number of physicians called, and *all of them stated that the disease could have been caused by the trauma.* In the present case, not one single doctor testified that the cerebral thrombosis could have been caused by the original blow.

Jarka Corp. v. Norton (D.C. Pa. 1930) 56 F.(2d) 287, cited on page 28, has already been discussed on appellants' opening brief (page 33).

The syllabus quoted from the case of *Dinoni v. Vulcan Coal Co.* (Kan. 1931) 297 Pac. 721, cited on page 29, should be read in the light of the peculiar facts presented in that case. There an employee injured his knee, causing infection. Later, while walking in his home, with the use of a cane, he slipped and fell, striking the same knee against a chair, fracturing the kneecap. This was followed by an operation in which the fractured parts were wired together, and protracted and serious infection ensued. A physician testified that he believed the infection following the operation developed from the previous infected condition of the leg. The court, however, said that the facts of the second fall, the fractured kneecap, the difficult operation in wiring the broken parts together, and the

great danger of infection, all in effect contradicted and raised an issue as to whether the infection developed from the infected condition of the leg from the first injury. Furthermore, that, in order for there to be a causal connection between the original injury and the later condition, it must have been so naturally, without any intervening incident or the result of a necessary course on account of the original injury.

Thus, it will be seen that *two* separate accidents were sustained by the employee. Infection to the knee could have been caused as a result of either one. It was anybody's guess as to whether the infection arising from the second accident was attributable to the first. Such a question was not exclusively within the province of the doctor to determine.

The quotation from *Utah Delaware Mining Co. v. Ind. Comm.* (Utah 1930) 289 Pac. 94, omits a very important statement of the court, which, of itself, distinguishes the case from the facts involved herein. A portion of the part omitted reads as follows:

> "That at the time of the accident the applicant was injured rather severely in the region of the right kidney, is not disputed. *No opiniion was advanced,* and *no reason given by the physicians,* that if the diseased and infectuous condition of the kidney and of the gall bladder and the adhesions were not attributable to the injury received at the time of the accident, *to what likely or probable cause or causes they were attributable.*" (Italics ours)

Here, not only was an opinion advanced, and reasons given by the physicians, that the subsequent

paralysis was not attributable to the injury received, but a full explanation was given as to its probable cause.

Furthermore, it would seem that a causal connection could have been found there without the aid of medical testimony.

In any event, these two state cases were decided approximately fifteen years ago. Medical science has made considerable progress in the interim, so that even in the forward-looking states of Kansas and Utah, the opinions of medical experts on questions involving the pathological cause of physical ailments, might now be accorded more respect than was given them in 1930 and 1931.

On page 30, the statement is made that the Deputy Commissioner is not bound to accept the opinion of theory of any particular medical examiner. That is correct, but that rule assumes that there are several medical examiners testifying who differ in their opinions. Here, there was no conflict among the doctors.

It is also said that the Deputy Commissioner may rely upon his own observation and judgment in conjunction with the evidence. Cited in support thereof is the recent case of *Contractors PNAB v. Pillsbury*, No. 10, 950, recently decided by this court. The question involved therein was whether the contraction of pulmonary tuberculosis was due to working conditions. One physician actually testified that the disease could have developed since March, 1942, the commencement date of the employment. Another physician gave as his opinion that the employee suffered from a reactivated type of tuberculosis. A certain document

from an officer of the Navy Medical Corps confirmed the testimony of the claimant that he was free of tuberculosis before he left the mainland to work on the project.

It will, therefore, appear that there was ample medical evidence to sustain the finding.

Each of the other cases cited in support thereof, appearing in footnote 10 on page 31, with the exception of *Liberty Mut. Ins. Co. v. Marshall* (D.C. Wn. 1944), which is the opinion of the lower court herein from which this appeal is prosecuted, are fully discussed in appellants opening brief, and hence further comment thereon would be needless repetition.

The same may be said of *Frank Marra Co., Inc., v. Norton* (D.C. Pa. 1931) 56 F.(2d) 246; *So. Steamship Co. v. Norton* (D.C. Pa. 1941) 41 F. Supp. 108, and *McNeelly v. Sheppeard* (C.C.A. 5, 1937) 89 F. (2d) 956.

Liberty Mut. Ins. Co. v. Williams (Ga. 1932) 161 S.E. 853, can be distinguished as falling within that group of cases where the disability is so immediate and severe following the injury, that laymen in ordinary walks of life can infer cause from effect. There, also, the disability grew *progressively worse* following the original severe injury. Here, the condition of claimant progressively *improved* to such an extent that for three days preceding his sudden paralysis, he was able to work full time.

Associated Gen. Contractors v. Cardillo (App. D.C. 1939) 106 F.(2d) 327, was supported by medical testimony that the fatal hemorrhage resulted from

trauma, and, therefore, aids, rather than hinders, appellants in their position herein.

Independent Pier Co. v. Norton (C.C.A. 3, 1931) 54 F.(2d) 734, is likewise inapposite, since it did not involve the issue of casualty, but the question of continuing disability from an injured knee that had already been the subject of a compensation award.

Kemp v. Pittsburgh Terminal Coal Corp. (Pa. 1938) 3 Atl.(2d) 34, a decision by the Superior Court, cited on page 35, certainly does not support the position of appellee. There, the condition causing cessation of work was severe *headaches*, not *paralysis*. The original blow was so severe as to render the employee *unconscious*. He also suffered from *dizziness* thereafter, and had trouble with his eyes. When he was examined by a doctor, nine months later, he was unable to respond to the directions to undress. His blood vessels appeared normal, and there was no evidence of arteriorsclerosis. The doctor's conclusion was that "a concussion developed at the time of his injury, and that his personality changes that were reported by his family were the result of that injury." None of those elements are present in the case at bar. Furthermore, as the court pointed out, the connection between the injury and the disability that followed was not remote, but so direct and natural that the award did not depend solely upon the testimony of the professional witnesses.

In *Southern Cement Co. v. Walthall* (Ala. 1928) 117 So. 17, cited at page 37, the "other testimony" referred to in the quotation, consisted of a statement made by a doctor on cross-examination to the effect

that the blow might have been a *contributing cause* of the brain hemorrhage and resulting death, and of another doctor's statement that in his best judgment the blow was the cause, or a contributing cause to the paralysis. No such "other evidence" is present in the case at bar.

M. P. Moller Motor Car. Co. v. Unger (Md. 1934) 170 Atl. 777, cited at page 37, recognizes the rule that medical testimony is not required in those cases where by other evidence facts are shown which fairly and logically tend to prove that the accident was the efficient cause of the condition complained of. There, within a week following the head blow, the employee began showing symptoms of paralysis, by having trouble with his speech and his walk. He stopped working altogether about a month after the blow, took to his bed, *getting worse all the time*, until his death about three months following his injury. His attending physician stated that the accident could have been the cause of the illness which he found, *and that he knew of no intervening cause.*

This, therefore, is a case where the medical testimony was not altogether negative, and not necessarily required, since a layman in the ordinary walk of life could infer cause and effect from the facts.

Pierron v. Prudential Ins. Co. (Ohio 1941) 30 N. E.(2d) 563, is a case wherein there is medical testimony of possibility, coupled with evidence of disability immediately following the injury. Both were held sufficient for the award. The court recognized, however, that some of the afflictions from which plaintiff

suffered could not be said to be the result of the fall, without the aid of expert testimony.

To argue as appellees do on page 39, that the Deputy Commissioner did not find that the injury was the cause, proximate or otherwise, of the cerebral thrombosis, but merely found that claimant was disabled as a result of the injury, is to ignore the true meaning of the finding that "*as a result of the said injury*, the claimant was wholly disabled from December 1, 1942, to and including January 10, 1943, and from February 26, 1943, to and including November 18, 1943 * * * and that on November 19, 1943, the total disability of the claimant *resulting from the said injury* continued."

Certainly, it must be conceded that the type of disability suffered from February 26 on was altogether different than the type suffered between December 1 and January 10. Hence, a finding that his disability on and after February 26 was the "result" of the injury sustained is, in effect, a finding that there was a causal connection between the two events.

Throughout appellees brief, and particularly on pages 40 and 41, the impression sought to be conveyed is that the disability of claimant was *continuous* from December 1, 1942, on. Thus, it is said on page 40, that even assuming arguendo that the cerebral thrombosis did not result from the injury, but merely added to the disability, the employer would not be relieved of liability for the disability that existed on February 26, since liability for disability from the first cause continued and, on page 41, the statement is made that if the Deputy Commissioner had found that claimant's

disability resulting from the injury on December 1 had terminated prior to February 26, the date of the paralysis, the finding would have been contrary to the uncontradicted evidence of claimant, his wife and all his business associates.

Yet, did not the Deputy Commissioner actually find that claimant was only "disabled" from December 1 to January 10, and from February 26 on? Does not such a finding necessarily hold that he was not "disabled" between January 10 and February 26?

There is, therefore, a clearly recognized gap in the two periods of disability, and the evidence is clear that the "disability" suffered during the first period was of an altogether different nature than that suffered during the second period. How, then, can it be said that an intervening disease was merely superimposed upon a "compensable disability then existing"?

This should certainly distinguish the facts from those involved in *Bernatowitz v. Nacirema Operating Co.* (C.C.A. 3, 1944) 142 F.(2d) 385, cited at page 40.

In attempting to distinguish *Burton v. Holden & M. Lbr. Co.* (Vt. 1941) 20 A.(2d) 99, and *Pac. Employers Ins. Co. v. Ind. Acc. Comm.* (Cal. 1941) 118 P.(2d) 334, appellees again refer to the claimants injury as a *serious* wound on the head. Yet, his own attending physician called it merely a "scratch," and it was conceded that the blow was not serious enough to produce unconsciousness or a fracture of the skull. Also, appellees refer to persistent *dizziness*, which the record does not bear out.

It is submitted that the attempted distinction of

these two cases is invalid, and that they squarely support appellants' contention as to the necessity of medical evidence to establish causality in those cases where the subsequent disability does not flow so directly and naturally from the original injury as to be within the knowledge of laymen to pass upon.

CONCLUSION

Full opportunity is afforded claimants under the Longshoremen's Act to introduce medical testimony to establish causality, in those cases where the ultimate disability does not follow the original injury so naturally and immediately as to be within the common knowledge of laymen. If a claimant does not produce such testimony, or if the doctor that he does produce, does not support his contention, then sound logic demands that the Deputy Commissioner should not be permitted to speculate on the subject, or to ignore the uncontradicted testimony of medical experts who say that there is no connection whatsoever between the original injury and the subsequent ultimate disability. To hold otherwise, affords the employer no protection whatsoever, since it places him in the arbitrary power of the Deputy Commissioner, who, under the law, is directed to construe the act liberally in favor of the employee, and to give him the benefit of any doubt.

Respectfully submitted,

EGGERMAN, ROSLING & WILLIAMS,
D. G. EGGERMAN,
EDW. L. ROSLING,
DEWITT WILLIAMS,
JOSEPH J. LANZA,
Attorneys for Appellants.

No. 10996

United States

Circuit Court of Appeals

For the Ninth Circuit.

GEORGE KERR,

Appellant,

vs.

P. J. SQUIER, Warden, United States Penitentiary, McNeil Island, Washington,

Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division

Rotary Colorprint, 661 Howard Street, San Francisco

No. 10996

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

ATTORNEYS OF RECORD

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JAMES W. MIFFLIN, Esq.,

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Attorneys for Petitioner-Appellant.

J. CHARLES DENNIS, Esq., United States Attorney

GUY A. B. DOVELL, Esq., Assistant United States Attorney

324 Federal Building, Tacoma, Washington

Attorneys for Respondent-Appellee.

United States District Court,
Western District of Washington,
Southern Division.

No. 657

GEORGE KERR,

Petitioner,

vs.

P. J. SQUIER, Warden, United States Penitentiary, MsNeil Island, Washington,

Respondent.

PETITION FOR WRIT OF HABEAS CORPUS

To the Honorable Judge of the District Court of the United States, Western District of Washington, Southern Division:

The petition of John M. Schermer and James W. Mifflin respectfully shows as follows:

1.

That you petitioners are attorneys at law, members of the Bar Association of the State of Washington and duly and properly admitted to practice in the Courts of the State of Washington and the above entitled Court; that your petitioners have been retained to represent the petitioner, George Kerr, who at the present time is confined as an inmate at the United States Penitentiary at McNeil Island, Washington.

II.

That your petitioner, George Kerr, was on the 12th day of March, 1934 sentenced to confinement in the United States Penitentiary at McNeil Island, Washington, by judgment, to serve an aggregate term of 27 years and pay a fine of $1000.00; that said judgment and sentence was in Cause Number 5925 In The Northern Division Of The United States District Court For The Northern District Of California, in a cause entitled United States Of America vs George Kerr; that said judgment was on a plea of guilty to counts 2, 4, 5, 6 and 7 [1*] of an indictment containing seven counts filed in said cause; that upon motion of the Government Counts 1 and 3 of said Indictment were dismissed as to said Petitioner, George Kerr; that said sentence provides that said petitioner be imprisoned for a period of ten years on the 2nd Count, which charged the said defendant with the crime of robbing one Walter E. Williams, a person having lawful charge, control and custody of certain mail matter of the United States; said mail matter being described as three registered mail bags thereof; that said judgment and sentence provided that said George Kerr be imprisoned for a period of five years upon Counts 4, 5 and 6 each; each of said counts charging, in identical language, that the defendant did unlawfully, knowingly and feloniously steal, take and abstract from a Post Office in the United States of America a certain mail bag. That each of the mail bags described in Counts 4, 5 and 6

*Page numbering appearing at foot of page of original certified Transcript of Record.

were the identical mail bags described in Count 2; that said George Kerr was further sentenced under Count 7 of said Indictment to be imprisoned for a period of two years and pay a fine of $1000.00; said 7th Count charging said George Kerr, with others, with the crime of conspiracy to commit the robbery aforementioned in Count 2 and the various larcenies alleged in Counts 4, 5 and 6.

III.

That said sentence was imposed on the 12th day of March, 1934, and the said George Kerr was forthwith committed to the County Jail for transportation to the Federal Penitentiary; that his sentence commenced to run from the 12th day of March, 1934 and he has served said sentence continuously up to the present time. [2]

IV.

That by said judgment and sentence the service thereof on each count was to be consecutive.

V.

That the Court pronouncing said sentence was without jurisdiction to sentence the said George Kerr on Counts 5 and 6 of said Indictment; that a computation of the time served by the said George Kerr, being given credit for good time, shows that he is now being illegally confined by the defendant herein; that the said George Kerr's record while an inmate of the institution, has been good and he is entitled to credit for good time served and industrial good time; that said computation shows that said

George Kerr completed service of the legal maximum time of imprisonment imposed under Counts 2, 4 and 7.

VI.

That in addition thereto he has served a period in excess of 30 days by reason of the fine imposed by the Court in the sentence on Count 7 of the indictment.

VII.

That the said George Kerr is a pauper, or poor prisoner, and totally without funds and unable to pay the fine of $1000.00 as prescribed by said sentence; that he has not any property exceeding $20.00 in value, except such as is by law exempt from being taken on execution for a debt; that until such time as the above entitled Court determines that he has served the maximum legal imprisonment he is not entitled to apply to the United States Commissioner in the [3] District where he is imprisoned for leave to take the pauper's oath and have the said Commissioner determine that he is in fact a pauper as within the meaning of Title 18, U. S. Code, Section 641.

Wherefore the petitioners pray that a Writ of Habeas Corpus may be granted directed to the said P. J. Squier, Warden as aforesaid, commanding him to have the body of George Kerr before the said Court at a time and place therein specified to do and receive what shall then and there be considered concerning said George Kerr, together with the time and cause of his restraint and said Writ,

and that he, George Kerr, may be restored to his liberty.

JOHN M. SCHERMER
and
JAMES W. MIFFLIN
Petitioners

JOHN M. SCHERMER
and
JAMES W. MIFFLIN
Attorneys for George Kerr

[4]

United States of America
State of Washington
County of King—ss.

John M. Schermer being first duly sworn upon oath deposes and says:

That he is one of the petitioners in the above entitled matter; that he has read the foregoing Petition for Writ of Habeas Corpus, knows the contents thereof and believes the same to be true.

JOHN M. SCHERMER

Subscribed and sworn to before me this 31 day of August, 1944,

[Seal] WINIFRED KASTRUP
Notary Public in and for the State of Washington,
Residing at Seattle

[Endorsed]: Filed Sept. 1, 1944. [5]

[Title of District Court and Cause.]

ORDER TO SHOW CAUSE

This matter having come on for hearing this 1st day of September, 1944, and the petition of George Kerr for Writ of Habeas Corpus being on file and before the Court, and the Court having examined the files and records herein and being fully advised in the premises, now, therefore, it is hereby

Ordered, Adjudged and Decreed that respondent, P. J. Squier, Warden of the United States Penitentiary, McNeil Island, Washington, show cause in the above entitled Court at Tacoma, Washington, on Monday the 11 day of September 1944, at 10 o'clock A. M., of said day, why the prayer of the petitioner should not be granted, and it is further

Ordered that the Clerk of the Court forthwith mail or deliver to George Kerr, in whose behalf the petition was filed, to P. J. Squier, Warden of the Federal Penitentiary, McNeil Island, to counsel, the United States attorney for this District, or his assistant, each an uncertified copy of this order.

Done in open Court this 1st day of September, 1944.

CHARLES H. LEAVY
U. S. District Judge

Copy of above order and of petition handed U. S. Atty., Tacoma, 9/1/44 and mailed to George Kerr and P. J. Squier, Warden, 9/2/44. E. Scofield, Deputy.

[Endorsed]: Filed Sept. 1, 1944. [6]

[Title of District Court and Cause.]

RESPONDENT'S DEMURRER

Comes now the respondent, by the undersigned, his attorneys, and demurs to the petition for writ of habeas corpus herein, upon the following grounds and reasons:

1. That said petition does not state facts sufficient to entitle the petitioner to a release from his confinement in the United States Penitentiary on McNeil Island, Washington;

2. And upon the further ground that said petition does not allege sufficient facts to show that said petitioner is being unlawfully restrained by respondent.

3. That copy or record of the instrument attacked was not attached to petition.

J. CHARLES DENNIS
United States Attorney

GUY A. B. DOVELL
Assistant United States
Attorney

[Endorsed]: Filed Sept. 6, 1944.

[Title of District Court and Cause.]

RESPONDENT'S ANSWER AND RETURN

Comes now the above named respondent, P. J. Squier, Warden, United States Penitentiary, Mc-

Neil Island, Washington by J. Charles Dennis, United States Attorney for the Western District of Washington, and for his answer and return to the petition and amended petition for Writ of Habeas Corpus herein, and Order to Show Cause heretofore issued, admits, denies and alleges as follows:

I.

Respondent denies each and every allegation contained in the petition and amended petition for Writ of Habeas Corpus herein, save and except what is specifically admitted herein.

Further answering said petition and amended petition for writ of habeas corpus, and as an affirmative defense thereto and as return to the order to show cause issued herein, respondent alleges:

I.

That petitioner, George Kerr, is now being held in custody of the respondent as Warden of the United States Penitentiary at McNeil Island, Washington, by authority of a judgment *set*ence and commitment entered by the District Court of the United States for the Northern District of California, Northern Division, on the 12th day of March, [8] 1934 in a certain criminal case in said court entitled "United States of America vs. George Kerr, and being designated as Case No. 5925-Cr., records of said court.

II.

That the indictment containing seven counts in said Cause No. 5925-Cr. was returned on September

30, 1933, to which defendant George Kerr on arraignment on January 2, 1934, entered his plea of not guilty, and thereafter on March 12, 1934, being represented by counsel the defendant, George Kerr, petitioner herein, was allowed to withdraw his plea of not guilty, on motion of his counsel, and the petitioner thereupon plead guilty to counts 2, 4, 5, 6 and 7, counts 1 and 3 of said indictment being dismissed on motion of the government, whereupon the said defendant, George Kerr, petitioner herein, was sentenced by the court to imprisonment on the second count for a period of ten years, on the fourth, fifth and sixth counts for a period of five years each, and on the seventh count for a period of two years and to pay a fine of $1,000.00, sentence under fourth count to commence to run upon expiration of sentence under second count; sentence under fifth count to commence to run upon expiration of sentence under fourth count; sentence under six count to commence to run upon expiration of sentence under fifth count, and sentence under seventh count to commence to run upon expiration of sentence under sixth count.

That said indictment charged the defendant, George Kerr with violation of Section 320, Title 18, U.S.C.A. in Count two, in that defendant did rob one Walter E. Williams, a person having lawful charge, control and custody of certain mail matter being described as three registered [9] mail bags thereof, and in counts four, five and six in that defendant did commit larcenies from and out of a post office of the United States of certain mail bags which

were under separate labels and locks, and which charges were based upon violation of Section 317, Title 18, U.S.C.A. and in count seven in that defendant did conspire with others to commit the offenses charged in the preceding counts of the indictment.

III.

That thereafter the petitioner was delivered under said commitment by the United States Marshal to the United States Penitentiary at McNeil Island, Washington, sentence having commenced to run March 12, 1934, the date of imposition; and that pursuant to said judgment, sentence, and commitment said petitioner is now imprisoned and confined in the United States Penitentiary on McNeil Island, Washington, and his custody and confinement under such judgment and sentence is lawful and valid.

IV.

That the said petitioner, George Kerr, by virtue of his said confinement in the United States Penitentiary on McNeil Island has been deprived of no constitutional rights and is now lawfully and regularly confined in execution of said judgment and sentence.

Wherefore having fully answered the petition herein the respondent prays that the petition for writ of habeas corpus be denied and dismissed and the petitioner be remanded to the respondent's cus-

tody to carry out the sentence and judgment for which he is now imprisoned.

J. CHARLES DENNIS
United States Attorney

GUY A. B. DOVELL
Assistant United States
Attorney [10]

United States of America
Western District of Washington
Southern Division—ss.

P. J. Squier, being first duly sworn on oath, deposes and says:

That he is the respondent named in the above entitled action; that he has read the foregoing Respondent's Answer and Return and knows the contents thereof, and that the matter and things therein contained are true to the best of his knowledge, information and belief.

P. J. SQUIER

Subscribed and sworn to before me this 21st day of September, 1944.

(Seal) JOHN J. HOPKINS
Notary Public in and for State of Washington, residing at McNeil Island, Washington.

[Endorsed]: Filed Sept. 22, 1944. [11]

[Title of District Court and Cause.]

MEMORANDUM ON PETITION

This petition is based upon the position that the District Court, Northern District of California, the sentencing Court, did not have jurisdiction to impose sentence on Counts 5 and 6 of the indictment.

Ex parte Lago Marcino, 13 Fed. Supp. 947;
Colson v. Johnston, 35 Fed. Supp. 317.

A writ of habeas corpus will lie to determine the question of excessive punishment.

Stevens v. McClaughry, 207 Fed. 18.

Despite the fact that a one thousand dollar fine was imposed and petitioner has not been adjudged a poor prisoner or pauper, this Court has authority and must determine the question of excessive punishment prior to proceeding under Section 641 of Title 18, United States Code.

Hogan v. Hill, 9 F. Supp. 333.

Kerr v. Johnston, 130 Fed. 2d, 637 was an application for a release brought by this same petitioner in the United States District Court, Northern Division of California. That application was brought in 1941 and was decided in 1942. An examination of the original petition therein and the briefs shows that the sole contention at that time was that Counts 4, 5 and 6 were all invalid as being an integral part of Count 2, the robbery [12] count. At the time the petition in that case was brought, the petitioner, George Kerr, had not served the sentence imposed on Count 4. Therefore the question raised in the

instant petition for a writ of habeas corpus was not before the Court in Kerr v. Johnston, supra, and the language contained in that case is not controlling on the instant decision of the Court.

Respectfully presented,

JOHN M. SCHERMER
JAMES W. MIFFLIN
Attorneys for Petitioner

[Endorsed]: Filed Sept. 26, 1944. [13]

[Title of District Court and Cause.]

PETITIONER'S REPLY TO RESPONDENT'S ANSWER AND RETURN

Comes now the above named petitioner, by his attorneys, John M. Schermer and James W. Mifflin, and for his traverse and reply to respondent's answer and return, admits, denies and alleges as follows:

I.

Admits the allegations contained in paragraphs I and II of respondent's Affirmative Defense.

II.

Admits the allegations contained in paragraph III of said respondent's Affirmative Defense, except that petitioner denies the allegations contained in lines 17 and 18 thereof.

III.

Denies each and every allegation contained in paragraph IV of said Affirmative Defense.

Wherefore, having fully replied and traversed to the allegations contained in said respondent's Answer and Return and the affirmative defense therein, petitioner prays that the relief prayed for in his petition on file herein be granted.

JOHN M. SCHERMER
JAMES W. MIFFLIN
Attorneys for Petitioner [14]

State of Washington
County of King—ss.

John M. Schermer, being first duly sworn upon oath deposes and says:

That he is one of the attorneys for the petitioner above named and makes this verification on his behalf for the reason that said petitioner is now confined to the United State Peniteitiary at McNeil Island, Washington, and is not available for signature thereof; that he has read the foregoing Reply and Traverse and knows the contents thereof and that the matters and things therein contained are true to the best of his knowledge, information and belief.

JOHN M. SCHERMER

Subscribed and sworn to before me this 25th day of September, 1944.

(Seal) EDA M. KRULLER
Notary Public in and for the State of Washington, residing at Seattle.

[Endorsed]: Filed Sept. 26, 1944. [15]

[Title of District Court and Cause.]

ORDER OVER-RULING DEMURRER AND GRANTING LEAVE TO AMEND

This matter having come on for hearing the 11th day of September, 1944, the petitioner being present in person and represented by his counsel, John M. Schermer, and respondent being represented by his counsel, J. Charles Dennis, United States Attorney and Guy A. B. Dovell, Asst. United States Attorney, upon hearing of the demurrer interposed by the respondent, and the Court having examined the files and records herein and being fully advised in the premises,

It is Hereby Ordered, Adjudged and Decreed that the demurrer of the respondent interposed herein be and the same is hereby over-ruled,

And it is Further Ordered, Adjudged and Decreed that the petitioner is permitted to amend his said petitioned by filing with the Clerk of the above entitled court, certified copies of the indictment and judgment and sentence relevant to the above entitled cause, and serving a copy thereof upon counsel for the respondent. [16]

And it is Further Ordered, Adjudged and Decreed that respondent's exceptions to the foregoing order are noted and allowed.

Done in Open Court this 27 day of September, 1944.

CHARLES H. LEAVY
Judge

Presented by:

JOHN M. SCHERMER
Attorney for Petitioner

Received copy of above order Sept. 27, 1944.

GUY A. B. DOVELL
Asst. U. S. Atty.

[Endorsed]: Filed Sept. 27, 1944. [17]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled matter coming on before the court on the 16th day of October, 1944, for further hearing upon the Order to Show Cause heretofore issued herein, pursuant to continuance of hearing from September 27, 1944, and a previous continuance from September 11, 1944, the petitioner having appeared in person at time of said previous hearings and being represented now and at said prior hearings by John M. Schermer, of his counsel, John M. Schermer and James W. Mifflin, and the respondent having been represented by J. Charles Dennis, United States Attorney and Guy A. B. Dovell, Assistant United States Attorney for this district, and the court having heretofore on September 11, 1944, overruled the respondent's demurrer to the petition and respondent having thereupon made and filed his answer and return thereto, and the court having, on September 27, 1944, heard the testimony of the peti-

tioner and received the documentary evidence submitted by counsel for respondent and petitioner, and on the 16th day of October, 1944, received the further evidence submitted by counsel for petitioner, and the court having heard and considered the arguments of counsel, and considered the matter before the court, the law and the evidence, and being fully advised in the premises, now makes the following: [18]

FINDINGS OF FACT

I.

That petitioner, George Kerr, is now being hold in custody of the respondent as Warden of the United States Penitentiary at McNeil Island, Washington, by authority of a judgment, sentence and commitment entered by the District Court of the United States for the Northern District of California, Northern Division, on the 12th day of March, 1934, in a certain criminal case in said court entitled "United States of America vs. George Kerr," and being designated as Case No. 5925CR, records of said court.

II.

That the indictment containing seven counts in said Cause No. 5925-CR was returned on September 30, 1933, to which defendant, George Kerr, on arraignment on January 2, 1934, entered his plea of not guilty, and thereafter on March 12, 1934, being represented by counsel, the defendant George Kerr, petitioner herein, was allowed to withdraw his plea of not guilty, on motion of his counsel, and petitioner

thereupon plead guilty to counts 2, 4, 5, 6 and 7, Counts 1 and 3 of said indictment being dismissed on motion of the government, whereupon the said defendant, George Kerr, petitioner herein, was sentenced by the court to imprisonment on the second count for a period of ten years, on the fourth, fifth and sixth counts for a period of five years each, and on the seventh count for a period of two years and to pay a fine of $1,000.00, sentence under fourth count to commence to run upon expiration of sentence under second count; sentence under fifth count to commence to run upon expiration of sentence under fourth count; sentence under sixth count to commence to run upon expiration of sentence under fifth count, and sentence [19] under seventh count to commence to run upon expiration of sentence under sixth count.

That said indictment charged the defendant, George Kerr with violation of Section 320, Title 18, USCA in Count two, in that defendant did rob one Walter E. Williams, a person having lawful charge, control and custody of certain mail matter being described as three registered mail bags thereof, and in counts four, five, and six, in that defendant did commit larcenies from and out of a post office of the United States of certain mail bags which were under separate labels and locks, and which charges were based upon violation of Section 317, Title 18, U.S.C.A. and in count seven in that defendant did conspire with others to commit the offense charged in the preceding counts of the indictment.

III.

That thereafter the petitioner was delivered under said commitment by the United States Marshal to the United States Penitentiary at McNeil Island, Washington, service from date of imposition; and that pursuant to said judgment, sentence and commitment said petitioner is now imprisoned and confined in the United States Penitentiary on McNeil Island, Washington, and his custody and confinement under such judgment and sentence is lawful and valid.

Petitoner, by counsel, excepts to so much of the foregoing finding as involves the validity of his present confinement, and his exception is allowed.

IV.

That while an inmate of said institution said petitioner's conduct has been good and he has worked in prison industries and from a computation of the time served by said petitioner it appears he has already completed service of the legal maximum time of imprisonment [20] in custody imposed under counts 2, 4 and 7 of said indictment, and that on a cumulative sentence of seventeen years thereunder would have been entitled to conditional release on July 28, 1944, or, with fine, August 28, 1944.

V.

That the three mail bags described in counts 4, 5 and 6 of the indictment were simultaneously taken and their taking involved but one transaction and were all of the mail bags carried at that time by the said Walter E. Williams, custodian thereof named

in said indictment and each was under a separate label and lock as set forth in the said counts, to-wit:

In count 4 as bearing label "From Sacramento, California, to San Francisco, California," and closed by rotary lock No. J 1988-425;

In count 5 as bearing label "From Sacramento, California, to Chicago, Illinois," and closed by rotary lock No. H18880-384; and

In count 6 as bearing label "From Sacramento, California, to Sacramento Terminal, Sacramento, California," and closed by rotary lock No. L 1057-11.

Done in Open Court this 23 day of Dec., 1944.

CHARLES H. LEAVY
United States District Judge.

From the foregoing Findings of Fact, the Court now makes the following

CONCLUSIONS OF LAW

I.

That the court has jurisdiction of the parties to this cause and of the subject matter thereof. [21]

II.

That the court in said Cause No. 5925 CR had jurisdiction of the person and offense against him and had jurisdiction to impose the said aggregate sentence of twenty-seven years and a payment of a fine of $1,000.00.

III.

That each of the offenses set forth in counts 4, 5 and 6 of said indictment, which charged the peti-

tioner in each of said counts with the theft of a different mail bag, requires proof of a fact that the others do not, and the theft of each bag was a separate offense under the provisions of Section 317, Title 18, U.S.C.A. and the sentences imposed under said counts 4, 5 and 6 of the indictment are valid.

IV.

That petitioner's conviction and sentence under Sections 88, 317 and 320 of Title 18, U.S.C. upon his plea of guilty to the counts 2, 4, 5, 6, and 7 of the indictment in said Cause No. 5925 CR and representation by counsel as hereinbefore found, was and is in all respects valid and binding, and petitioner is not now unlawfully restrained and detained by the respondent.

V.

That petitioner has failed to establish grounds upon which he is now entitled to be released from him present confinement in the United States Penitentiary at McNeil Island, Washington, and that his petition for writ of habeas corpus and release from confinement should be denied.

To all of which Conclusions of Law petitioner, by counsel, excepts and his exceptions are hereby allowed.

Done in Open Court this 23 day of December, 1944.

CHARLES H. LEAVY
United States District Judge.

Presented by:

GUY A. B. DOVELL
Assistant United States
Attorney

Approved as to form and Notice of Entry waived.

JOHN M. SCHERMER
Attorney for Petitioner.

[Endorsed]: Filed Dec. 26, 1944. [23]

[Title of District Court and Cause.]

ORDER OF DISMISSAL

The above entitled matter coming on before the court on the 16th day of October, 1944, for further hearing upon the Order to Show Cause heretofore issued herein, pursuant to continuance of hearing from September 27, 1944, and previous continuance from September 11, 1944, the petitioner having appeared in person at time of said previous hearing and being represented at all hearings in this matter before the court by John M. Schermer of his counsel, John M. Schermer and James W. Mifflin, and the respondent having been represented by J. Charles Dennis, United States Attorney, and Guy A. B. Dovell, Assistant United States Attorney for this district, and the court having heretofore on September 11, 1944, overruled the respondent's demurrer to the petition and respondent having thereupon made and filed his answer and return thereto, and the court having on September 27, 1944, heard the

testimony of the petitioner and received the documentary evidence submitted by counsel for respondent and petitioner, and on the 16th day of October, 1944, received the further evidence submitted by counsel for petitioner, and the court having heard and considered the arguments of counsel and having heretofore on the 23rd day of December, 1944, made and entered its Findings of Fact and Conclusions of Law wherefo*r*m it appears that the petitioner is not entitled to any relief prayed for in his said petition; now, therefore, it is hereby

Ordered that the petition of the petitioner herein be, and the same is hereby denied; that the above entitled action be, and the same is hereby dismissed; and it is further

Ordered that the petitioner is remanded to the custody of the respondent, P. J. Squier, Warden of the United States Penitentiary on McNeil Island, Washington, to complete the service of the sentence imposed upon him by the District Court of the United States for the Northern District of California, Northern Division.

To which ruling the petitioner, by counsel, excepts and his exceptions are hereby allowed.

Done in Open Court this 23 day of Dec., 1944.

CHARLES H. LEAVY
United States District Judge.

Approved as to Form and Notice of Entry waived.
JOHN SCHERMER
Of Counsel for Petitioner

Presented by:

GUY A. B. DOVELL
Assistant United States
Attorney

[Endorsed]: Filed Dec. 23, 1944. [25]

[Title of District Court and Cause.]

NOTICE OF APPEAL

To the Clerk of the above entitled Court to George W. Kerr, to P. J. Squier, Warden, United States Penitentiary, McNeil Island, Washington, to Charles A. Dennis, United States Attorney and Guy A. B. Dovell, Asst. United States Attorney: his attorneys:

You and each of you will please take notice that George W. Kerr, petitioner in the above entitled matter and appellant herein, hereby appeals to the United States Circuit Court of Appeals for the Ninth Circuit from an order of dismissal and judgment made and entered in the above entitled cause on the 23rd day of December, 1944, denying said petition and discharging the Order to Show Cause theretofore issued herein.

Dated: December 28, 1944.

JOHN M. SCHERMER
JAMES W. MIFFLIN
Attorneys for George W. Kerr,
Petitioner and Appellant

Copy of the within Notice of Appeal delivered to Guy A. B. Dovell, Asst. United States Attorney, this 29th day of December, 1944.

E. E. REDMAYNE,,
Deputy Clerk

Receipt of a copy of the within Notice of Appeal is hereby acknowledged this 29th day of December, 1944.

GUY A. B. DOVELL,
Asst. U. S. Attorney

[Endorsed]: Filed Dec. 29, 1944. [26]

[Title of District Court and Cause.]

PETITION FOR EXTENSION OF TIME TO DOCKET CAUSE IN CIRCUIT COURT OF APPEALS

Comes now the petitioner above named and alleges as follows:

I.

That your petitioner above named now is and at all times herein mentioned was incarcerated as an inmate at United States Penitentiary at McNeil Island, Washington.

II.

That Findings of Fact and Conclusions of Law and an order denying petitioner's application for a writ of habeas corpus were entered in the above entitled cause on the 23rd day of December, 1944.

That thereafter, on the 28th day of December, 1944, notice of appeal from the entry of said Findings of Fact, Conclusions of Law and order was duly given and filed. That since that time petitioner's counsel have been engaged in the trial of several causes, each requiring extended preparation and extended attendance thereon. That this matter throughout has been handled by Mr. Schermer of petitioner's counsel, and that Mr. Schermer, on January 8, 1945, was without notice called to Palo Alto, California, by reason of the serious illness of his father. That as a result, Mr. Schermer has been unable to diligently prepare and perfect petitioner's appeal, and that petitioner's counsel require additional time to perfect the appeal. [27]

III.

That petitioner believes that an extension of time to 28 day of February, 1945, will enable petitioner's counsel to properly perfect the appeal.

JOHN M. SCHERMER
JAMES W. MIFFLIN
Attorneys for Petitioner and Appellant

State of Washington
County of King—ss.

John M. Schermer, being first duly sworn upon oath deposes and says: That he is one of the attorneys for appellant in the above entitled cause, that he has read the foregoing petition, knows the contents thereof and believes the facts therein stated

to be true and the application for extension of time to docket cause in the Circuit Court of Appeals is meritorious and well taken.

JOHN M. SCHERMER

Subscribed and sworn to before me this 5th day of February, 1945.

(Seal) WINIFRED KASTRUP
Notary Public in and for the State of Washington, residing at Seattle.

Copy received this 6th day of Feb., 1945.

J. CHARLES DENNIS,
U. S. Attorney

[Endorsed]: Filed Feb. 6, 1945. [28]

United States District Court, Western District of Washington, Southern Division

No. 657

GEORGE KERR,

Petitioner,

vs.

P. J. SQUIER, Warden, United States Penitentiary, McNeil Island, Washington,

Respondent.

ORDER

This matter having come on for hearing this 6 day of February, 1945, upon petitioner and appellant's application for an extension or enlargement of time in which to docket the above entitled cause on appeal in the office of the Clerk of the Circuit

Court of Appeals for the 9th Circuit, petitioner appearing by one of his attorneys, John M. Schermer, and the court having examined the petition of the petitioner, and having examined the files and records herein and being fully advised in the premises, now, therefore,

It is Hereby Ordered, Adjudged and Decreed that the time for docketing the above entitled cause on appeal in the office of the Clerk of the United States Circuit Court of Appeals for the 9th Circuit be and the same is hereby extended and enlarged to the 28 day of February, 1945.

Done in Open Court this 6 day of February, 1945.

CHARLES H. LEAVY
Judge

Presented by:

JOHN M. SCHERMER
Of Attorneys for Petitioner

Approved:

HARRY SAGER
Asst. U. S. Atty.

[Endorsed]: Filed Feb. 6, 1945. [29]

[Title of District Court and Cause.]

ASSIGNMENT OF ERRORS

Comes now George Kerr, petitioner in the above entitled action, and by John M. Schermer and James W. Mifflin, his attorneys of record, and in connection with his petition for appeal in the above entitled

action assigns the following errors which he alleges occurred upon the hearing of the above entitled action and upon which he will rely upon appeal to the United States Circuit Court of Appeals for the 9th Circuit, from the Order of Dismissal made by this honorable court on December 23, 1944:

I.

The court erred in ordering the petition denied and the Order to Show Cause to be discharged.

II.

The court erred in holding that the allegations contained in said petition for a Writ of Habeas Corpus were insufficient in law to justify the granting of an order, discharging the petitioner herein.

III.

The court erred in holding that the Conclusions of Law made by the court followed from the Findings of Fact made by the court. [30]

IV.

Petitioner alleges that from the Findings of Fact made by the court after the hearing of the evidence introduced and the examination of the exhibits introduced and admitted, that the court erred in making its Conclusions of Law.

Wherefore, said appellant and petitioner prays that the order and judgment of the United States District Court, Western District of Washington, Southern Division, made and entered herein in the

office of the Clerk of said court, on the 23rd day of December, 1944, denying the petition of George Kerr for a Writ of Habeas Corpus, heretofore entered herein, be reversed, and that the said George Kerr, petitioner and appellant herein, be granted a Writ of Habeas Corpus and discharged from the custody of the Warden of the United States Penitentiary at McNeil Island, Washington.

Dated this 9th day of February, 1945.

JOHN M. SCHERMER
JAMES W. MIFFLIN
Attorneys for Petitioner and Appellant

Received copy 2/10/45.

GUY A. B. DOVELL
Of Counsel for Respondent

[Endorsed]: Filed Feb. 10, 1945. [31]

[Title of District Court and Cause.]

PETITION

To the Honorable Judge of the District Court of the United States, Western District of Washington, Southern Division:

Comes now George Kerr, petitioner and appellant above named and respectfully represents to the Court:

I.

That he is the petitioner in the above entitled cause and that he is at present incarcerated as a

prisoner at United States Penitentiary at McNeil Island, Washington. That as a result of his incarceration his funds for prosecuting the appeal in the above entitled cause are limited.

II.

That five exhibits were introduced during the trial of the above cause, and that said five exhibits consist as follows:

Petitioner's 1; Appellee's brief in the prior case of Kerr vs. Johnston.

Petitioner's 2; Certified copy of record, including indictment, commitment, etc., in the case of United States vs. Kerr.

Petitioner's 3; Brief of appellant Kerr vs. Johnston.

Petitioner's 4; Appellant's reply brief Kerr vs. Johnston. [32]

Petitioner's 5; Respondent's A-1; certified copies of petition for writ; order to show cause; return to order to show cause; points of authorities in support of petition; Kerr vs. Johnston.

That all the foregoing exhibits are somewhat voluminous, and would entail considerable expense to incorporate in the transcript of record.

That your petitioner respectfully requests that the court enter an order herein directing that the original exhibits be forwarded for docketing and filing in the office of the Clerk of the United States Circuit

Court of Appeals, 9th Circuit, at San Francisco, California.

JOHN M. SCHERMER
JAMES W. MIFFLIN
Attorneys for Petitioner

State of Washington
County of King—ss.

John M. Schermer, being first duly sworn upon oath deposes and says. That he is one of the attorneys for appellant in the above entitled cause, that he has read the foregoing petition, knows the contents thereof and believes the facts therein stated to be true.

JOHN SCHERMER

Subscribed and sworn to before me this 8th day of February, 1945.

(Seal) WINIFRED KASTRUP
Notary Public in and for the State of Washington, residing at Seattle.

Received copy 2/10/45.

GUY A. B. DOVELL
Of Counsel for Respondent

[Endorsed]: Filed Feb. 10, 1945. [33]

[Title of District Court and Cause.]

ORDER

This matter having come on for hearing this 10 day of February, 1945, upon the petition of the

above named appellant for the issuance of an order directing that the original exhibits introduced and admitted herein during the trial of the above cause be forwarded to the office of the Clerk of the United States Court of Appeals, 9th Circuit, at San Francisco, California, for docketing, filing and use in the appeal herein in lieu of incorporation of said exhibits by copying by the Clerk of the above entitled Court in the transcript of record, and the Court having examined the files and records herein, and it appearing to the Court that said exhibits are somewhat voluminous, and that the appellant is incarcerated as a prisoner at United States Penitentiary at McNeil Island, Washington, and has limited funds with which to prosecute his said appeal, and the Court being fully advised in the premises, now, therefore,

It is Hereby Ordered, Adjudged and Decreed that the Clerk of the above entitled Court be and the same is hereby authoried to forward the following exhibits offered and admitted in the trial of the above cause: [34]

Petitioner's 1; brief.

Petitioner's 2; certified copy of record

Petitioner's 3; brief of appellant

Petitioner's 4; appellant's reply brief

Petitioner's 5; respondent's A-1. Certified copies of record

to the Clerk of the Court, United States Circuit Court of Appeals, 9th Circuit, at San Francisco, California, and the said Clerk of the above entitled

Court, in view of the foregoing order, is not required to copy said exhibits in the transcript of record.

Done in Open Court this 10 day of February, 1945.

CHARLES H. LEAVY
Judge

Presented by:

GUY A. B. DOVELL
JOHN M. SCHERMER,
Attorneys for Petitioner and Appellant

[Endorsed]: Filed Feb. 10, 1945. [35]

[Title of District Court and Cause.]

COST BOND ON APPEAL

Know All Men By These Presents: That we, George Kerr, Petitioner, as principal, and Continental Casualty Company, a corporation organized under the laws of the State of Indiana, as surety, are held and affirmatively bound under the above named respondent, P. J. Squier, Warden, United States Penitentiary, McNeil Island, Washington, in the full and just sum of $250.00, to be paid to the said respondent, his heirs, executors, administrators, successors or assigns, to which payment well and truly to be made we bind ourselves, our heirs, executors, administrators, successors and assigns, jointly and severally by these presents.

Executed this 9th day of February, 1945.

The condition of this application is such that:

Whereas, on the 23rd day of December, 1944, in the above entitled action between the above named petitioner, George Kerr and the above named respondent, P. J. Squier, Warden, an order was entered denying petitioner's application for a writ of habeas corpus, dismissing the above entitled action and remanding the petitioner to the custody of the respondent, and the said petitioner has appealed to the [36] United States Circuit Court of Appeals, 9th Circuit.

Now, Therefore, the said George Kerr, petitioner, shall pay the costs if said appeal is dismissed, or the order of dismissal affirmed, or such costs as the Appellate Court may award if the judgment is modified, then the above obligation to be void; otherwise in full force and effect.

GEORGE KERR
By JOHN M. SCHERMER,
his attorney

(Seal) CONTINENTAL CASUALTY COMPANY
[Illigible]
Its Attorney in Fact

Approved 2/10/45.

CHARLES H. LEAVY
U. S. Dist. Judge

[Endorsed]: Filed Feb. 10, 1945. [37]

[Title of District Court and Cause.]

PRAECIPE FOR TRANSCRIPT OF RECORD

To the Clerk of the Above Entitled Court:

You will please prepare a certified transcript of record on appeal to the United States Circuit Court of Appeals, 9th Circuit, in the above entitled cause, and include therein the following papers and proceeding:

1. Petition for writ of habeas corpus
2. Order to Show Cause
3. Respondent's demurrer
4. Respondent's answer and return
5. Petitioner's reply to respondent's answer and return
6. Respondent's memorandum on petition
7. Order over-ruling demurrer and granting leave to amend
8. Findings of Facts and Conclusions of Law
9. Order of dismissal
10. Notice of appeal
11. Petition for entry of order extending time for docketing in Circuit Court
12. Order extending time for docketing
13. Petition directing clerk to forward original exhibits to Circuit Court
14. Order directing clerk to send original exhibits to Circuit Court
15. Copy of this praecipe
16. Bond for costs

17. Assignment of Errors to be relied upon on appeal

Dated this 9 day of February, 1945.

JOHN M. SCHERMER
JAMES W. MIFFLIN
Attorneys for Petitioner and Appellant

Received copy 2/10/45.

GUY A. B. DOVELL
Of Counsel for Respondent.

[Endorsed]: Filed Feb. 10, 1945. [39]

[Title of District Court and Cause.]

CLERK'S CERTIFICATE

I, Millard P. Thomas, Clerk of the United States District Court for the Western District of Washington, do hereby certify and return that the foreing Transcript, consisting of pages numbered 1 to 39, inclusive, is a full, true and correct copy of so much of the record, papers and proceedings in Cause 657, George Kerr, Petitioner-Appellant, vs. P. J. Squier, Warden, United States Penitentiary, McNeil Island, Washington, Respondent-Appellee, as required by Appellant's Praecipe for the Transcript of the Record on Appeal, on file and of record in my office at Tacoma, Washington, and the same constitutes the Transcript of the Record on Appeal from the Order of Dismissal of the United States

District Court for the Western District of Washington, Southern Division, to the United States Circuit Court of Appeals for the Ninth Circuit.

I do further certify that pursuant to order of the District Court I have this day transmitted to the Circuit Court of Appeals for the Ninth Circuit, original exhibits numbered as follows, to-wit: Petitioner's Exhibits Nos. 1, 2, 3 and 4; Respondent's Exhibit No. A-1.

I do further certify that the following is a full true and correct statement of all expenses, fees and charges [40] earned by me in the preparation and certification of the aforesaid Transcript of the Record on Appeal, to-wit:

Appeal fee	$ 5.00
Clerk's fee for preparing, comparing and certifying Transcript of the Record on Appeal of the Petitioner-Appellant, 33 folios @ 15c per folio, and 60 folios @ 5c per folio, and certificate.....	8.45
	$13.45

I do further certify that the said fees, as above set forth, have been paid to me in full by the aforesaid Petitioner-Appellant.

I do further certify that the appeal in the foregoing cause was taken within the statutory time allowed, there being no particular provisions of the local rules of the District Court for this District

otherwise fixing the time for taking appeals from orders in habeas corpus cases.

In Testimony Whereof I have hereunto set my hand and affixed the seal of said Court, in the City of Tacoma, in the Western District of Washington, this 15th day of February, 1945.

[Seal] MILLARD P. THOMAS
Clerk

By E. E. REDMAYNE
Deputy [41]

[Endorsed]: No. 10996. United States Circuit Court of Appeals for the Ninth Circuit. George Kerr, Appellant, vs. P. J. Squier, Warden, United States Penitentiary, McNeil Island, Washington, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the Western District of Washington, Southern Division.

Filed March 5, 1945.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10996

GEORGE KERR,

Petitioner,

vs.

P. J. SQUIER, Warden, United States Penitentiary, McNeil Island, Washington,

Respondent.

STIPULATION AND REQUEST THAT EXHIBITS BE CONSIDERED IN THEIR ORIGINAL FORM

Comes now the parties above named and respectfully request the above entitled Court that said Court permit the appellant herein to present the original exhibits to the Court for consideration in their original form and not require said exhibits to be printed in the transcript of record.

I.

All the exhibits herein consist of printed briefs of a prior cause and certified copies of records and pleadings in said prior cause.

II.

That the appellant herein is incarcerated as an inmate at the Federal Penitentiary at McNeil Island, Washington, and does not have adequate funds, and that if said permission is granted it will

materially assist him in preparing and presenting his appeal herein. That the above set forth request is agreeable to counsel for all parties herein.

JOHN SCHERMER
JAMES W. MIFFLIN
Counsel for Apellant

OK:

J. CHARLES DENNIS
GUY A. B. DOVELL
Counsel for Respondent

Ordered that the original exhibits herein need not be printed, but will be considered by the Court in their original form.

CURTIS D. WILBUR
Senior United States Circuit Judge.

[Endorsed]: Filed Mar. 4, 1945. Paul P. O'Brien, Clerk.

No. 10,996

IN THE
UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

GEORGE KERR, *Appellant,*

vs.

P. J. SQUIER, Warden of the United States Penitentiary, McNeil Island, Washington, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR APPELLANT

JOHN M. SCHERMER,
JAMES W. MIFFLIN,
Counsel for Appellant.
30th Floor Smith Tower,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

No. 10,996

IN THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

GEORGE KERR, *Appellant*,

vs.

P. J. SQUIER, Warden of the United States Penitentiary, McNeil Island, Washington, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR APPELLANT

JOHN M. SCHERMER,
JAMES W. MIFFLIN,
Counsel for Appellant.
30th Floor Smith Tower,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

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UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

BRIEF FOR APPELLANT

STATEMENT OF THE CASE

This appeal is from the entry of an order of the United States District Court for the Western District of Washington, Southern Division, denying Appellant's petition for a Writ of Habeas Corpus (Tr. 23-24).

FACTS OF THE CASE

Appellant was indicted upon seven (7) counts of an indictment (Pet. Ex. 2) charging violations of the postal laws, pleaded guilty on Counts 2, 4, 5, 6 and 7; he was sentenced to imprisonment for ten (10) years on Count 2, five (5) years on each of Counts 4, 5 and

6, and two (2) years and a fine of $1,000.00 on Count 7, all sentences to run consecutively (Pet. Ex. 2).

Appellant concedes the validity of the sentence imposed on Counts Two, Four and Seven. It is his contention that the sentencing Court was without jurisdiction to impose sentence on him on Counts Five and Six, for the reason that said sentence placed him in double jeopardy by imposing double punishment, and is therefore void.

Count 2 charged a violation of Title 18, U.S.C.A., Section 320, namely, robbery of three certain registered mail bags from a named custodian of the same, at the Sacramento Post Office, California, February 9, 1933 (Pet. Ex. 2).

Counts 4, 5 and 6 charged a violation of Title 18, U.S.C.A., Sec. 317, namely, unlawfully, knowingly and feloniously stealing, taking and abstracting out of the Sacramento Post Office, California, the same three registered mail bags, each separately charged as an offense, as are referred to in Count 2, on the same date (Pet. Ex. 2).

Count 7 charged a violation of Title 18, U.S.C.A., Section 88, namely, a conspiracy to commit and the commission of certain acts aiding the commission of the acts complained of in the previous counts (Pet. Ex. 2).

The physical facts are not in dispute. The Appellant, in company with others, committed the crime of robbery of a custodian of mail matter at the time and place charged (Pet. Ex. 2). There was but one custodian, one Williams, a postal employee; but one

transaction, the taking of three registered, locked mail pouches from the said Williams, and that transaction was simultaneous and inclusive, all having occurred at the precise time and place charged in the indictments (Pet. Ex. 2). For this single transaction and simultaneous taking (Tr. 20-21), the Appellant received a sentence of ten years on Count Two, five years each on Counts Four, Five and Six for taking the said mail bags from the Post Office, and two years and a fine of $1,000.00 on Count 7 (Pet. Ex. 2).

ASSIGNMENTS OF ERROR

The errors assigned and relied upon on this appeal are:

1. The Court erred in holding that the allegations contained in said petition for a Writ of Habeas Corpus were insufficient in law to justify the granting of an order discharging the Appellant herein (Tr. 23-24).

2. The Court's Findings of Fact do not support the Court's Conclusions of Law (Tr. 21-23).

3. The Court's Findings of Fact (Tr. 17-21) are inconsistent with the Court's order denying Appellant's petition for discharge (Tr. 23-24).

4. The Court erred in denying the discharge of Appellant from custody (Tr. 23-24).

QUESTION

Did the trial court, after imposing sentence on Counts Two, Four and Seven, have the power to further impose sentence on Counts Five and Six? It is conceded that the sentences on Counts Two, Four and Seven were valid, in that each of said counts and sen-

tences thereon, although arising out of one transaction, denounces a different class of criminal act. The question here, however, goes to whether or not, the taking, being one transaction and simultaneous, and not selective, double punishment has been inflicted for one criminal act, to-wit: the larceny of three mail bags.

ARGUMENT

The fundamental concept underlying Appellant's appeal in the case at bar is an oft enunciated rule of law, stemming from the Fifth Amendment to the Constitution of the United States. The Appellant contends that his rights were infringed upon, and he has been subjected to double punishment by the imposition of the sentences on Counts Five and Six. Under the Fifth Amendment to the Constitution of the United States, the sentences were invalid and the Court, without jurisdiction to impose them, if they do so constitute double punishment.

Ex-parte Lagomarsino (C.C.A. 9) 88 F.(2d) 86;
Pringle v. United States, 128 F.(2d) 736;
Stevens v. McLaughry, 207 Fed. 18.

In the case at bar, the District Court, after hearing evidence and argument of counsel, made and entered Findings of Fact (Tr. 18-21). Finding No. 5 (Tr. 20-21) clearly states that the taking of the three mail sacks, charged in Counts Four, Five and Six of the original indictment were "simultaneously taken and their taking involved but one transaction, and were all of the mail bags carried at that time by the said Walter E. Williams, custodian thereof, named in said indictments * * *." In view of this Finding, it is submitted that the case at bar comes precisely within the rule voiced by several recent decisions.

In *Ex-parte Lagomarsino* (*supra*) the Appellant was charged under an indictment containing five counts; Count One charged breaking and entering into a certain post office with intent to commit larceny;

Count Two charged that with intent to rob mail, defendant cut a certain mail pouch used for the conveyance of mail. Count Three charged the defendant did steal, take and abstract mail from said pouch. Count Four, also alleges stealing from the said mail depository, and Count Five was identical. The only distinction in Counts Three, Four and Five was that mail matter addressed to different persons were taken from the same depository. In that case, Lagomarsino conceded that the sentences on Counts One, Two and Three were valid, but contended that the sentences on Counts Four and Five were invalid, as being all part of one simultaneous transaction. The Court, in determination of this matter said:

> "The parcels charged to have been stolen under Counts 3, 4, and 5 are three separate articles and had a different addressee. It is conceded by the appellant that the taking might have been simultaneous and continuous.
>
> (2, 3) In *Braden v. U. S.* (C.C.A.) 270 F. 441, in which Judge Sanborn, later Justice of the Supreme Court, sat with the other Circuit Judges, it is said held that the larceny of four horses from a barn at the same time constituted but one offense. While every presumption must be indulged in favor of the judgment and sentence, *Hall v. Johnston, Warden* (C.C.A.) 86 F. (2d) 820, just decided, but where upon the face of the record it is disclosed that the offense charged involved several separate articles, not charged as separately taken, but which may have been simultaneous and continuously taken, a different relation obtains. Suppose a flock of sheep is stolen as one act. May the thief be punished for stealing each sheep simultaneously and con-

tinuously driven away? If a person kills a flock of sheep, unless under very peculiar circumstances, the killing of each sheep would be a separate act, as cutting separate mail bags. To take several letters from a mail depository simultaneously and continuously is one act and comprehends one intent.

This court held in *Parmagini v. U. S.*, 42 F. (2d) 721, that concealment and distribution of narcotics was a part of the indivisible acts of the offense of selling. That case, however, is distinguished from this in that the concealing and distributing were merely steps to the consummated act of selling. The acts charged in counts 3, 4, and 5 connote a simultaneous and continuous act, therefore, are indivisible parts of the act charged in count 3.

Appellee concedes that the sentences on Counts 1, 2, and 3 are valid, but contends that as to Counts 4 and 5 the sentences pronounced were void because the charges in said counts were indivisible parts of the offense charged in count 3, and having served the sentences on counts 1, 2 and 3, his further detention is unlawful. The District Court so held and ordered the defendant discharged. Affirmed."

In *Colson v. Johnston*, 35 F. Supp. 317, the defendant was charged under an indictment containing eleven counts. The first count charged assault on Post Office employees in charge of mail matter. The second count charged robbery of the said post office employees of a certain number of registered mail pouches. The remaining counts, No. 3 to 11 inclusive, contained the identical charges against the petitioner contained in the second count, save that in each latter

count reference was made to a different numbered mail pouch. All of the several mail pouches, however, referred to in Counts 2 to 11, formed a part of the mail matter which was taken in a single robbery upon which the charges in the indictment were based. The Court said as follows:

> "(1) It is the conclusion of this court that the sentences imposed on petitioner under these remaining counts are, and each of them is, invalid as being in excess of the power of the sentencing court; that such court, after having imposed a sentence of twenty-five years on the second count, reached the limit of its jurisdiction so far as its power to sentence petitioner for the offenses set forth in the indictment was concerned. This conclusion is based in turn on the determination of this court that although it contained eleven separate counts, the indictment against petitioner in fact stated but one offense carrying a maximum penalty of twenty-five years, namely robbery of mail matter from persons having custody thereof in the course of which the lives of such persons were placed in jeopardy by the use of dangerous weapons. And petitioner, having served the maximum sentence, is entitled to release from further custody. * * *
>
> "(4) Counts three to eleven, inclusive, charge the identical offense charged in count two and consequently the sentences imposed thereunder are void. What these remaining counts propose to do is to make as many separate acts of robbery out of what was in fact a single robbery as there were mail pouches taken in that one robbery. Section 197 of the Criminal Code (*supra*) does not authorize such an interpretation of its provisions. Further, the case of *Johnston v. Lago-*

marsino, 88 F. (2d) 186, of this Ninth Circuit, is authority for the proposition that a single theft cannot be split up into as many separate offenses of theft as there were articles taken in the theft.

"Petitioner has served his full sentence for the crime of robbery of mail matter from postal employees in charge thereof, whose lives were placed in jeopardy by the use of dangerous weapons in the course of the robbery. The later consecutive sentences imposed on him under the other counts of the indictment which were repetitious of the same offense of which he had served full time were in excess of the power of the court to impose and, therefore, illegal and void.

"(5) Wherefore, the writ of habeas corpus will be issued and the petitioner will be discharged;" * * *

While it is true that the decision of a District Court is not binding upon this Court, it is significant, however, that the facts in the *Colson* case are identical with the facts in the present appeal, and it is further significant that the U. S. District Attorney for the Northern District of California, Southern Division, did not see fit to appeal to the Circuit Court of Appeals. By inference, in *McKee v. Johnston*, 125 F.(2d) 282, this court, at page 383, has tacitly approved the ruling in the *Colson* case. At that time, this court, in distinguishing the *McKee* case then before the court, from the *Colson* case, stated:

"that the indictment referred to in *Colson v. Johnston, Warden* (D.C. Cal.) 35 F. Supp. 317, called to our attention by appellants as supporting their cause, did not charge the abstraction of letters, etc., from the mail bags stolen, but simply designated the theft of each bag under a separate count."

The most recent case pertinent to this issue is *Robinson v. United States* (C.C.A. 10), reported 143 F.(2d) 276. This case was decided on May 26, 1944, and a re-hearing denied July 17, 1944. In this case, the appellant, Robinson, was charged under two indictments. The court concluded that the sentence imposed upon the three counts contained in the second indictment were valid. The question which is apropos to the present inquiry arose, however, under the first indictment which contained four counts. The first count of that indictment charged a conspiracy. The second, third and fourth counts charged the defendant with transporting in interstate commerce from Texas to Oklahoma by means of a motor vehicle three different women for the immoral purpose of having the said women engage in the practice of prostitution. Each of the latter three counts were identical, except for the identity of the different women. The court in this matter delivered a rather exhaustive and searching opinion, which is peculiarly controlling and persuasive with reference to the instant cause.

> "The question remains whether counts two, three and four in No. 13,457 charge separate and distinct offenses. 18 U.S.C.A., Sec. 398, makes it an offense to transport in interstate commerce 'any woman or girl for the purpose of prostitution or debauchery, or for any other immoral purpose.'
>
> "We think it is a fair inference that each of the women named in counts two, three, and four of No. 13,457 was transported at the same time and in the same automobile.
>
> "(2) The test for determining whether the of-

fenses charged in the several counts of the indictment are identical is whether the facts alleged in one, if offered in support of the others, would sustain a conviction. Where each count requires proof of a fact, which the others do not, the several offenses charged are not identical.

"It may be urged that in order to establish count two in No. 13,457, it was necessary to prove the transportation of the particular woman named therein and that she was transported for the purpose of prostitution, facts not required to be proven in order to establish either of the other two counts; that the same may be said with respect to counts three and four; and, hence, that each count required proof of facts which the others did not.

"(3) The same transaction may constitute separate and distinct crimes where it is susceptible of separation into parts, each of which in itself constitutes a completed offense. But the same evidence test must be applied with some discrimination. Merely because one element of a single criminal act embraces two persons or things, a prosecutor may not carve out two offenses by charging the several elements of the single offense in different counts and designating only one of the persons or things in one count and designating only the other person or thing in the other count.

"(4) Unlawful transportation is the gist of the offense. In order to come within the statute, it must be of a woman or girl and for one or more of the immoral purposes designated in the statute. Here, the transportation was a single continuous act and the offense was completed when the transportation crossed the state line. As to each woman the offense commenced and

ended simultaneously. There was not a series of steps, following one after the other, each of which constituted in itself a complete offense. We think an analogy may be drawn with larceny at common law. Larceny is the felonious taking by trespass and the carrying away of the personal property of another, without the latter's consent, and with the felonious intent permanently to deprive the owner of such property. If a person drove a vehicle to the barn of another and unlawfully and feloniously loaded into the vehicle 25 sacks of corn, which had been stored in the barn by the owner, and carried it away with the intent permanently to deprive the owner of the possession thereof, such person would be guilty of a single larceny, although he loaded each sack into the vehicle separately and had an unlawful intent as to each sack of corn. It would constitute a single offense, even though the corn taken belonged to different owners, because there would be one single act of taking and carrying away.

"And, by the weight of authority, where the same act or stroke results in the death of two persons, acquittal or conviction of the murder of one bars a subsequent prosecution for the killing of the other, because the killing is but one crime and cannot be divided. If a single act against two persons, where the offense is against the person, constitutes but one offense, it must be all the more true when, as here, the offense is not against the person, but consists in the unlawful transportation for one of the interdicted purposes, and there was but a single transportation.

"(5) We are of the opinion that the transportation here was a single, continuous act and constituted but one offense.

> It follows that counts two, three, and four of the indictment in No. 13,457 constituted but one offense, and the maximum sentence which could have been lawfully imposed under No. 13,457 was seven years, and the maximum sentence which could have been lawfully imposed under No. 13,528 was twelve years.
>
> "The order is reversed and the cause is remanded with instructions to vacate the sentences and impose new sentences within the limitations above indicated."

In light of the foregoing, it would seem that the appellant's position is unequivocally correct. However, counsel for the appellant is mindful of this court's ruling in the case of *Kerr v. Johnston*, 130 F.(2d) 637. The Appellant in that matter is the identical appellant herein and at first blush it would appear that the position of the appellant in this proceeding has previously been adjudicated.

A careful examination of that prior case will disclose that the point raised in that proceeding was definite and distinct from the present matter at issue. The present question was not even before the Court at that time. The Writ was then sought on the theory that the sentencing court was without jurisdiction to impose sentence on any counts other than Counts Two and Seven. An examination of the briefs in that matter filed herein as exhibits (Petitioner's One, Petitioner's Three, Petitioner's Four) disclose conclusively that appellant's then contention, which the District Circuit Courts resolved against him, was that since only one transaction occurred, he could not be sentenced for both robbery, under Title 18 U.S.C.A., Sec.

320, and larceny, under Title 18 U.S.C.A., Sec. 317. Indeed, Appellant was not then eligible to question the validity of sentence on Counts Five and Six, having at that time not served any time under Count Four of the indictment; *McNally v. Hill*, 293 U.S. 131. That being so, certainly the government could be in no better position than the Court. If the Appellant was not eligible to challenge the validity of Counts Five and Six, then the government could not ask for what would amount to a declaratory judgment as to their validity. In the government's brief, filed in that cause (Pet. Ex. 1) on p. 7 thereof, it is said, after setting forth the two pertinent statutes, being Sections 317 and 320 of Title 18 U.S.C.A.:

> "bearing in mind the two above quoted statutes, the only question that need now be decided is: Does Count 2 recite an offense separate and distinct from that recited in Count 4? Whether or not Counts 4, 5 and 6 recited but one offense and justified but one sentence, need not be decided, since on authority of *McNally v. Hill*, 293 U.S. (3), if the conviction and sentence on Count 4 was proper, Appellant cannot question his imprisonment until he has served the unexpired portion of the sentence on Count 4."

Again, in the brief of Appellant (Pet. Ex. 3) on p. 4 thereof, in a summary of the question to be then decided, it is said:

> "in short, were the acts complained of in Counts 4, 5 and 6, necessarily part of and included within the findings, alleged in Count Two so as to preclude separate punishment therefore."

The language of *Kerr v. Johnston* (*supra*), although not on its face conclusive, must accordingly be

read and interpreted in light of the foregoing. It is self evident that when the Court said, at p. 639

> "the evidence charged in Count Two was distinct from the evidence charged in Counts Four, Five and Six, *Schultz v. Hudspeth*, 10 Circ., 123 Fed. (2d) 729. The findings charged in Counts Four, Five and Six were distinct from each other. *McKee v. Johnston*, 9th Circ., 109 Fed. 2, p. 273, 275. Hence, the sentences imposed under Counts Four, Five and Six, as well as those imposed under Counts Two and Seven were valid."

The Court simply meant that Counts Four, Five and Six were all valid as to the particular question then before the Court; in short, the sentence on Count Two for robbery did not preclude the passing of a valid sentence for larceny under Title 18 U.S.C.A., Sec. 317.

As part of the sentence imposed on Count Seven of the indictment, the Court ordered the Appellant to pay a fine of $1,000.00. The Appellant, in his petition (Tr. 5) has alleged that he is a pauper or poor prisoner. In order for the Appellant to purge himself of the fine, he must show affiirmatively that he has served at least one month after completion of all valid terms of imprisonment. By the District Court's Findings of Fact No. 4 (Tr. 20) it is shown that he has so served, it is uncontroverted that he has been in continuous custody since 1934, that more than one month has elapsed since August 28, 1944, and that he is still in custody. It is the position of Appellant that under the provisions of Title 18 U.S.C.A., Sec. 641, which relates to the exoneration of poor prisoners from the payment of fines, that before he can invoke the jurisdiction of the appropriate U. S. Com-

missioner, this court must first adjudicate the question of whether or not he has completed service of terms of imprisonment imposed by the sentencing court on all valid sentences. Manifestly, the U. S. Commissioner does not have the jurisdiction to determine the validity of the detention of the Appellant, where such detention is under and by virtue of a judgment and commitment valid on its face. This view of the proper procedure is substantiated by the opinion in *Hogan v. Hill*, 9 F. Supp. 333, at p. 336, Paragraph 7, thereof. Under that holding, it would appear that the indicated method would be to invite this Court to determine the validity of the imposition of the sentence under which the Appellant is detained, and that if this court determines that the imposition of the sentences on Counts Five and Six was invalid, then, although the instant application for a Writ of Habeas Corpus must be denied, the cause may be remanded to the District Court, to permit the Appellant to make the appropriate showing before the U. S. Commissioner having jurisdiction. This is the procedure followed in *Hogan v. Hill* (*supra*).

CONCLUSION

It is axiomatic that each application for a Writ of Habeas Corpus is de novo and is therefore to be considered on its individual merits. It is submitted that the precise question presented by this appeal has not heretofore been determined, with respect to this individual Appellant.

The language of several of the cited cases, particularly that contained in *Colson v. Johnston* (*supra*), *Robinson v. United States* (*supra*) and *Ex-parte Lagarmarsino* (*supra*) is so apt, so in point, and so decisive of the issue herein that any argument evolved by the Appellant would be repetitious and fulsome. It is apparent that the Conclusions of Law (Tr. 21-22) and the order of the District Court (Tr. 23-24), cannot be supported by the Findings (Tr. 17-21), and that this Court should reverse the order of the District Court, subject to the Appellant's qualification as a pauper or poor prisoner, under Title 18 U.S.C.A., Sec. 641.

Respectfully submitted,

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JAMES W. MIFFLIN,
Counsel for Appellant.

No. 10996

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE KERR,

Appellant,

— vs. —

P. J. SQUIER, Warden, United States Penitentiary, McNeil Island, Washington,

Appellee.

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HONORABLE CHARLES H. LEAVY, *Judge.*

BRIEF OF APPELLEE

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HONORABLE CHARLES H. LEAVY, *Judge.*

BRIEF OF APPELLEE

QUESTIONS PRESENTED

First: Does the theft of each of three mail bags taken at the same time from a mail custodian constitute three separate and distinct offenses under Title 18, U.S.C.A. Section 317, as charged in Counts 4, 5 and 6 of the indictment herein?

Second: In view of the fact that pending settlement of fine the appellant herein is not now and was not at time of his previous appeal (130 F. (2d) 637, 639) entitled to immediate release, even if all unserved counts were invalid, can it be said the first question is now before the court and was not at that time?

STATEMENTS OF PLEADINGS AND FACTS

On September 1, 1944, appellant appearing by legal counsel filed his present petition for writ of habeas corpus in the District Court of the United States for the Western District of Washington, Southern Division, alleging among other things that his sentence was imposed and commenced to run on March 12, 1934, which he has served continuously since; that the court was without jurisdiction to sentence him on counts 5 and 6 of said indictment; that computation shows that he has completed service of the legal maximum time of imprisonment imposed under counts 2, 4, and 7, being entitled to good time allowance; that he is a pauper and has served a period in excess of 30 days by reason of fine imposed under count 7, but is not entitled to apply for leave to take the pauper's oath and have the court determine that he is in fact

a pauper until such time as the court determines he has served the maximum legal imprisonment. (Tr. 2-6).

The District Court thereupon issued an Order to Show Cause, returnable September 11, 1944 (Tr. 7). The appellee Warden appeared by the United States Attorney for said district and demurred to the petition. (Tr. 8.) Thereafter on September 27, 1944, time of further hearing, appellee's demurrer was overruled and appellant was granted leave to amend his petition (Tr. 16), which application after hearing October 16, 1944, on the amended petition, the return thereto (Tr. 8-12), and reply (Tr. 14-15) was denied and appellant was remanded to the custody of appellee to complete the service of his sentence. (Tr. 14-24).

December 29, 1944 appellant filed with the clerk of said District Court his notice of appeal (Tr. 25), from order of dismissal formally entered December 23, 1944 (Tr. 23-24). Order extending time to docket this cause was entered February 6, 1945. (Tr. 28-29).

Some three or four years previous to his present application, the appellant after having served that portion of his sentence in the United States Penitentiary, Alcatraz, California, which with credit for good behavior and industrial good time would have entitled

him to release from sentence equivalent to ten years and two years on counts 2 and 7, filed his petition for writ of habeas corpus in the United States District Court for the Northern District of California, Southern Division, alleging sentences on counts 4, 5, and 6 illegal and void and constituting double jeopardy and double punishment in that the crime alleged in said counts 4, 5, and 6, and the sentences thereunder were for the same offense set forth in count 2 of the indictment and punished thereunder.

The California District Court denied appellant's petition and this court affirmed the decision below, and held the offenses charged in count 2 was distinct from the offenses charged in counts 4, 5, and 6; that the offenses charged in counts 4, 5, and 6 were distinct from each other; and the status of the undisposed of fine under count 7 would not in any event entitle appellant to a present release by writ of habeas corpus.

See *Kerr v. Johnston, Warden*, (C.C.A. 9, September 10, 1942), 130 F. (2d) 637.

Thereafter appellant was transferred to the United States Penitentiary on McNeil Island, Washington, where he is now serving sentence under said judgment of the court.

ARGUMENT

1. THE THEFT OF EACH OF THREE MAIL BAGS TAKEN AT SAME TIME FROM CUSTODIAN IS A SEPARATE OFFENSE.

The Statute involved in this proceeding is Title 18, U.S.C.A. Section 317, which provides as follows:

> "Whoever shall steal, take, or abstract * * * from or out of any * * * post office * * * any letter, postal card, package, bag, or mail * * * shall be fined not more than $2,000, or imprisoned not more than five years, or both."

The related offenses defined in Sections 312 and 313 of said title make the injury to and theft of such mail bag, respectively, a separate and distinct offense.

And this court in a former appeal herein has so construed the above Section 317 as to the counts of the indictment here involved.

Kerr v. Johnston, 130 F. (2d) 637, 639.

The theft of each mail bag whether in use or merely belonging to the Post Office Department is a separate offense under the terms of Title 18, U.S.C.A., Section 313, and has been so held in the case of *Phillips v. Biddle*, (C.C.A. 8, 1926), 15 F. (2d) 40, 41, citing as direct authority *Ebeling v. Morgan*, 237 U. S. 625, wherein the Supreme Court at pages 629-630, said:

> "The separate counts each charged by its distinctive number the separate bag, and each time one of them was cut there was, as we have said, a separate offense committed against the statute. Congress evidently intended to protect the mail in each sack, and to make an attack thereon in the manner described a distinct and separate offense."

The court in the Ebeling case did not extend such protection to each letter or piece of mail in the sack as a separate entity, but gave to such contents a blanket protection.

And citing as authority the same case, this court in the case of *Johnston v. Lagomarsino*, 88 F. (2d) 86, 88, held:

> "These two sections (312 and 317) apply to two separate and distinct offenses. One injury to a 'mail bag', and the other refers to taking from a depository of 'mail matter'. Each has a distinctive function. The mail bag carries the mail and informative matter, and such was no doubt the intent of the Congress, for mail could not have been intended by Congress as a generic term and cover the express purpose of these sections, which are to protect the *bag* and the *mail within the bag*. (Italics ours). The intent of the act is to make it an offense to cut each mail bag and when a bag was cut the offense was complete. *Ebeling v. Morgan*, 237 U.S. 625, 35 St. Ct. 710, 59 L.Ed. 1151."

To contend that the three sacks here involved were along with their contents just so much mail mat-

ter is to overlook the reasoning of the courts and the apparent purpose disclosed in the language of the several statutes.

This court in the case of *McKee vs. Johnston*, 109 F. (2d) 273, 275, followed the Ebeling case in its interpretation of Section 317, holding:

> "No distinction of significance can be drawn between the statute there involved, 18 U.S.C.A., Section 312, and the one before us. A locked and registered mail pouch, consigned by the postal authorities to a named destination, is an authorized depository for the mail matter contained in it. It is made an offense to steal a letter from any authorized depository. It is also an offense denounced by the statute to abstract from a mail pouch any article or thing contained therein. *Here, each of the pouches bore a different number and the required proof of the theft differed in the case of each pouch.*" (Italics ours).

In the McKee case this court followed the construction laid down in the Ebeling case and did not find three letters taken from a single pouch constituted three separate offenses. On the other hand, the court did find in the words of the Supreme Court:

> "Congress evidently intended to protect the mail in *each* sack, * * *" *Ebeling v. Morgan*, supra.

Therefore, to contend that the wholesale theft of three mail bags from the hands of a mail custodian constitutes but a single offense is not only to

make an exception to the Supreme Court's construction of protection for each mail bag, but also to claim without any apparent reason for such theft, a far lesser penalty than for the theft of three mail bags from a railway post office.

See *Phillips v. Biddle*, supra.

Appellant would confuse the nature of the offense under Section 317, supra, with that of a continuous offense, such as illicit cohabitation, a single offense, as held by *In Re Snow*, 120 U.S. 274, or larceny at common law as distinguished in *Braden v. United States* (8th Circ.) 270 F. 441, 444; or where the gist of the offense is such as the case of unlawful transportation of women in interstate commerce, *Robinson v. United States*, 143 F. (2d) 276; or sale of narcotics, *Parmagini vs. U. S.* 42 F. (2d) 721.

Simultaneous taking or act may have been pleaded to cover a multitude of offenses in such cases where no statutory or natural numerical limitation was set upon a single offense either as to things or persons involved or acts done. But, such was not the test applied by the Supreme Court in its construction as to the theft of each mail pouch. *Ebeling v. Morgan*, supra, *Morgan v. Devine*, 237 U.S. 632, and cases there cited.

And in *Morgan v. Devine*, supra, at page 639, the court quoted from Bishop's Criminal Law, 8th Ed.:

> "The test is whether, if what is set out in the second indictment had been proved under the first, there could have been a conviction; when there could, the second count cannot be maintained; when there could not, it can be."

And to the same effect and following the Ebeling case is *Blockburger v. United States*, 284 U.S. 299, 303, cited in *Robinson v. United States*, supra.

> "The test is whether the individual acts are prohibited or the course of action which they constitute."

Blockburger v. United States, supra, page 302, quoting from Wharton's Criminal Law, 11th Ed.; *Braverman v. United States*, 317 U.S. 49, 54, reversing 125 F. (2d) 283.

And *Colson v. Johnston*, 35 F. Supp. 317, 318, forbidding the making of separate acts of robbery out of what was in fact a single robbery, is not at variance with the cases above cited.

The case of *McDonald v. Hudspeth*, 129 F. (2d) 196, 199, holding the number of offenses committed in a bank robbery for putting in jeopary the life of *any* person, would be equivalent to the number of lives so affected and charged, is an example of one trans-

action simultaneously performed, constituting by statute a number of offenses. See Section 588(b), Title 12, U.S.C.A. See also *Gavieres v. United States*, 220 U.S. 338; *Burton v. United States*, 202 U.S. 344, 377.

2. The validity of counts 4, 5, and 6 were before the court in appellant's former appeal as now (130 F. (2d) 637), if the question is proper in these proceedings where appellant must still serve a part of his sentence not assailed as invalid.

Under the rulings as found, footnote 6, in *McNally v. Hill*, 293 U. S. 131, 139, the Circuit Court of Appeals in circuits other than the 8th have uniformly denied petitions for writ of habeas corpus when the prisoner was not at the time serving the part of sentence said to be invalid.

This ruling has not been strictly adhered to in some cases.

See *Colson v. Aderhold*, 5 F. Supp. 111.

This court in *Ex parte De Maurez*, 106 F. (2d) 457, 458, and again in *DeMaurez v. Squier*, 121 F. (2d) 960, under circumstances somewhat similar as here, held the offenses there charged were separate and distinct, refusing, however, in the latter case to

decide which of the two statutes in question was violated.

If under the holding in *Hogan v. Hill*, 9 F. Supp. 333, 337, appellant's application is to be considered not premature, although the writ must be denied in any event, there would seem no logical contention could be made against this court having passed upon the issue here at the time of the former appeal, except that in the nature of the proceedings further litigation should not be discouraged.

CONCLUSION

For the foregoing reasons, it must be contended the decision below should be affirmed.

Respectfully submitted,

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GUY A. B. DOVELL,
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APPELLANT'S REPLY BRIEF

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30th Floor Smith Tower,
Seattle 4, Washington.

THE ARGUS PRESS, SEATTLE

SUBJECT INDEX

TABLE OF CASES

STATUTES

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

GEORGE KERR, *Appellant*, vs. P. J. SQUIER, Warden of the United States Penitentiary, McNeil Island, Washington, *Appellee*.	No. 10,996

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF WASHINGTON, SOUTHERN DIVISION

APPELLANT'S REPLY BRIEF

REPLY TO APPELLEE'S FIRST QUESTION

An examination of the cases cited by the respondent in support of his contention relative to the first question set forth in his brief will disclose that without exception they do not support the argument whatsoever.

In support of the contention that the theft of three mail bags taken at the same time from a mail custodian constitutes separate offenses under Title 18, U. S.C.A., Section 317, the appellee relies upon a chain of cases stemming from *Ebeling v. Morgan*, 237 U.S. 625.

It is significant that only a small portion of the

opinion of *Ebeling v. Morgan, supra,* is set forth in the brief of the appellee. A complete reading of that case will show that it went solely to the question of whether separate offenses are committed when defendant, while in the course of one transaction, cuts individual mail bags. Since the cutting of a mail bag is specifically denominated a crime under Title 18 U.S.C.A., Section 312, and as the gist of the offense is the cutting, it is obvious that a valid distinction lies between the simultaneous taking of three bags from one custodian and the cutting of three bags. Under Section 312 it would be impossible to conceive of a factual situation wherein a defendant did simultaneously cut three bags with intent to obtain possession of the contents thereof. It is significant that although the statutes of the United States make it a crime to steal mail matter, the *Ebeling* case, *supra,* specifically states that there is a distinction between a transaction wherein an offense is completed as in the cutting cases, and other types of crimes where the act is also a continuous transaction,

> "when the facts showed that there was but one offense committed between the earliest day charged and the end of the continuing time attempted to be charged in separate indictments. These and similar cases are but attempts to cut up a continuous offense into separate crimes in a manner unwarranted by the statute making the offense punishable." *Ebeling v. Morgan,* page 630.

The case of *Phillips v. Biddle* (C.C.A. 8, 1926) 15 F. (2d) 40, is cited in appellant's brief as authority for his position. The case was heard by the Circuit Court on a totally different question. The matter at issue

there was whether or not the theft of mail bags could be punishable under the section under which the appellant was sentenced or under a separate and distinct section of the code. That question became important because if appellant was correct the Court had imposed a sentence in excess of the statutory limits under the proper section. The question at issue here was not raised in the *Phillips* case except that in the opinion, by *obiter dicta*, the court stated gratuitously that the theft of separate bags constituted separate offenses and cited as authority therefor the *Ebeling* case, *supra.*

In other words, appellant does not quarrel with the rule that cutting mail bags constitutes a separate offense for each mail bag cut. Indeed, this Circuit Court has voiced that rule in *Johnston v. Lagomarsino*, 88 F.(2d) 86, 88. It is significeant however, that after so holding in the *Lagomarsino* case it was then held that the taking of separate pieces of mail matter from a locked mail pouch, a depository for mail, cannot be set out as separate offenses for each piece of mail matter taken. Thus it seems to us that the cases cited by appellee do not bear upon the question before the court at the present time. They also cite as authority for their position the case of *Blockburger v. U. S.*, 284 U.S. 299. This case clearly sets forth the distinction that should be applied to a determination of the question here before the court. In the *Blockburger* case, *supra*, the defendant was charged under an information containing three counts, the pertinent question was raised under the construction of the sentence under Counts 2 and 3 thereof. Each of these counts

alleged a sale of narcotics on successive days to the same purchaser and the contention was made that this constituted one simultaneous transaction and thus punishable as only one crime. The United States Supreme Court very properly distinguished this case setting forth the rule that if the sale or sales had been simultaneous, and all part of one transaction, and not selective, then the appellant's position would be correct.

The appellee cites *McKee v. Johnston*, 109 F.(2d) 273, as authority for his position. In order to reach a proper determination of the question now before the court, it is necessary to carefully examine not only the *McKee* case above cited, but the later *McKee* case reported as *McKee v. Johnston*, 125 F.(2d) 282. McKee was charged with the abstraction of letters from a number of different mail pouches, all of the takings having been committed during the course of one transaction. There was no record before the court as to precisely how these crimes were committed and the court therefore in *McKee v. Johnston*, 109 F.(2d) 273 at page 275, said as follows:

> "In *Johnston v. Lagomarsino*, *supra*, it was held that separate counts allegedly abstracted at the same time of three different parcels from the same mail pouch charged but a single offense.
>
> "Here there was a feloneous taking of mail matter from each of six different pouches. It may be assumed and the assumption is properly warranted by the language of the indictment, that each taking was part of a continuous transaction. *However, it does not appear that the takings were simultaneous* (Italics ours). Since

> the record is not before us we are entitled to assume, in support of the judgment that the takings were not simultaneous and that they were selective." Cases cited.

It is apparent then, that the *McKee* case is not authority for our present position. We are not unmindful of the fact that this *McKee* case above cited was mentioned with approval and cited as authority when this same appellant was before this court in *Kerr v. Johnston, Warden,* 130 F.(2d) 637. While we contend that the precise question raised by this appeal was not then before the Circuit Court (See appellant's opening brief) nevertheless, if it was the record at that time could be said to be of the same kind as the record before the court in the *McKee* case above cited. However, the factual situation is now different. The trial court in our instant case has made a positive "finding of fact" to the effect that the takings of the three mail pouches in the instant case was *simultaneous and all one transaction.* That being so, the *McKee* case above quoted ceases to be authority for the appellee's position.

The *McKee* question again came before this court in *McKee v. Johnston,* 15 F.(2d) 282. An attempt was made to prepare and submit to this court a record showing that the takings were not selective and were simultaneous. However, the court held that the record was not complete and that there was no showing that the takings were simultaneous and not selective. In that case the court inferentially approved the holding in *Colson v. Johnston, Warden* (D. C. Cal. 35, Supp. 317) and the court's statement thereof is set forth

in full in the appellant's opening brief at page 9 thereof.

If one were to pursue appellee's argument, the logical result would be that depending solely upon the number of individual articles stolen as for example, sheep, a person could receive a much greater penalty for simple larceny than could be imposed for the violent crime of robbery. It is inconceivable that the intent of the congress should be so construed.

REPLY TO APPELLEE'S SECOND QUESTION

It is submitted that the appellee has not in any manner whatsoever, answered the appellant's question as to the proper procedure to be taken where, as in this instant case, the appellant has been fined under a judgment and committment valid on its face, but in fact invalid, as to part as being excessive where as part of that judgment and committment he was required to pay a fine and where he is unable to pay that fine. A careful reading of *Hogan v. Hill*, 9 F. Supp. 333, will show the procedure adopted by the appellant in this case is of necessity the proper one. Certainly a United States Commissioner would not have the authority to determine the validity of punishment imposed under a judgment and commitment valid on its face.

CONCLUSION

The gist of the crime under Counts 4, 5, and 6, of the indictment here is the *taking of mail matter from and out of a post office.* This defendant admits that he did so commit that crime by his entry of a plea of guilty and by his service of the punishment imposed under Count 4 of the indictment. That being so, and the trial court having made its finding of fact that the taking was simultaneous and all one transaction (Tr. 20-21) it would conclusively appear that this court should hold that the sentences imposed on Counts 5 and 6 of the indictment are void and excessive and remand this matter to the trial court with instructions to permit the appellant to make his application to the U. S. Court to be adjudged a pauper or poor prisoner under the provision Title 18, U.S.C. A., Section 641, and if he does so qualify to order his discharge under a writ of habeas corpus.

Respectfully submitted,

JOHN M. SCHERMER,
JAMES W. MIFFLIN,
Counsel for Appellant.

No. 10998

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA and THE SOCIAL SECURITY BOARD OF THE UNITED STATES OF AMERICA,

Appellants,

vs.

AUGUSTA J. LaLONE, on behalf of JULIE S. LaLONE, JANET D. LaLONE, JILL R. LaLONE and LANCE D. LaLONE,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the Eastern District of Washington Northern Division

Rotary Colorprint, 661 Howard Street, San Francisco

No. 10998

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

NAMES AND ADDRESSES OF ATTORNEYS OF RECORD

EDWARD M. CONNELLY,

United States District Attorney
334 Federal Building
Spokane, Washington

Attorney for Appellant

JUSTIN C. MALONEY

311 Empire State Building
Spokane, Washington

Attorney for Appellee

In the District Court of the United States for the Eastern District of Washington, Northern Division.

No. 404

AUGUSTA J. LaLONE, on behalf of JULIE S. LaLONE, JANET D. LaLONE, JILL R. LaLONE and LANCE D. LaLONE,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, THE SOCIAL SECURITY BOARD OF THE UNITED STATES OF AMERICA,

Defendants.

COMPLAINT

Plaintiff Alleges:

I.

That plaintiff is a resident of Spokane, Washington in the Eastern District of Washington, Northern Division. That plaintiff is the surviving wife of Dwight J. LaLone who died at Spokane, Washington on the 20th day of November, 1942. That on said date of death and for many years prior, plaintiff and said Dwight J. LaLone lived together as wife and husband. That as the issue of said marriage six children have been born and are now living, Jeanne A. LaLone, age 11 years. Julie S. LaLone, age 10 years, Janet D. LaLone, age 8 years, Jill R. LaLone, age 6 years, Lance D. LaLone, age 5 years and Thomas J. LaLone, age 1 year, the last of whom was born subsequent to the death of said Dwight J. LaLone. That all of said

children are under 18 years of age, are unmarried and have never been married, and on the 20th day of November, 1942 and during all of their lives prior thereto were dependent upon said Dwight J. LaLone, and ever since said date all of said children are and have been residing with and are and have been wholly dependent upon plaintiff.

II.

That on or about the 1st day of August, 1938 said decedent, Dwight J. LaLone entered the employ of F. S. Barrett & Co., a corporation, Spokane, Washington or Barrett-LaLone Insurance Agency, Spokane, Washington, [1*] as manager of the Insurance Agency at agreed monthly compensation of $200.00 per month plus automobile expense allowance. That said decedent remained in such employ until about the 1st day of May, 1942. That on or about the 1st day of May, 1942 said decedent entered the employ of Vermont Loan & Trust Company, a corporation, Spokane, Washington in charge of its insurance department and remained in said employment until the date of his death, November 20, 1942. That all such employment by said decedent constituted service by said decedent for his employers within the meaning of the Social Security Act of the United States.

III.

That subsequent to August 1, 1938 said decedent registered with the Social Security Board of the

*Page numbering appearing at foot of page of original certified Transcript of Record.

United States as an employee and obtained his social security account number which is 539-16-1206. That said registration as an employee under the Act was made in person by said Dwight J. LaLone and was made under the direction of the duly authorized officer of his said employer.

IV.

That claims for said Child's Insurance Benefits have been duly made to said Social Security Board by the plaintiff herein in cases numbered 12-268, 12-269, 12-270 and 12-271 in behalf of said minor children and the claims have been disallowed by said Board.

Wherefore Plaintiff Prays for judgment that the decision of the Social Security Board in cases numbered 12-268, 12-269, 12-270 and 12-271 for Child's Insurance Benefits be reversed and for judgment directing the allowance of said claims by said Social Security Board and for such other relief as to the Court may seem proper.

JUSTIN C. MALONEY
Attorney for Plaintiff

[Endorsed]: Filed May 8, 1944. [2]

[Title of District Court and Cause.]

SUMMONS

To the Above Named Defendants:

You and each of you are hereby summoned and required to serve upon Justin C. Maloney, plain-

tiff's attorney, whose address is 311 Empire State Building, Spokane, Washington, an answer to the Complaint which is herewith served upon you, within 60 days after service of this Summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the Complaint.

[Seal] A. A. LaFRAMBOISE
Clerk of Court

Dated May 8, 1944.

RETURN ON SERVICE OF WRIT

United States of America,
East. District of Wash.—ss.

I hereby certify and return that I served the annexed Summons & Complaint on the therein-named The United States of America by handing to and leaving a true and correct copy thereof with Edward M. Connelly, the United States Attorney, for the Eastern District of Washington, at Spokane in said District on the 8th day of May, 1944.

WAYNE BEZONA,
U. S. Marshal
By ELWYN L. DANIEL,
Deputy

RETURN ON SERVICE OF WRIT

United States of America,
East. District of Wash.—ss.

I hereby certify and return that I served the annexed Summons & Complaint on the thereinnamed The Social Security Board of The United States of America, by handing to and leaving a true and correct copy thereof with Arthur C. Kinnley, the Field Office Mgr. of the Social Security Board of Spokane, personally at Spokane in said District on the 11th day of May, 1944.

WAYNE BEZONA,
U. S. Marshal
By ELWYN L. DANIEL,
Deputy [3]

RETURN ON SERVICE OF WRIT

United States of America,
East. District of Wash.—ss.

I hereby certify and return that I served the annexed Summons and Complaint on the thereinnamed United States of America by depositing in the Post Office at Spokane, Wash. directed to said Attorney General of the United States of America at Washington, D. C. as registered mail, personally on the 8th day of May, 1944.

WAYNE BEZONA,
U. S. Marshal
By R. R. ISAACS,
Deputy

[Endorsed]: Filed May 11, 1944.

RETURN RECEIPT

Received from the Postmaster the Registered or Insured Article, the original number of which appears on the face of this Card.

1 Atty Gen
2 O. M. Bertrand

Date of delivery 5-13-1944

RETURN ON SERVICE OF WRIT

I hereby certify and return, that on the 13th day of May, 1944, I received the within summons and served the defendant, The Social Security Board of the United States of America, by handing to and leaving a true and correct copy of the within summons together with a copy of the complaint in said case with Newton Montgomery, an attorney of the Social Security Board of the United States of America, personally at 1825 H Street NW in the City of Washington, District of Columbia, on the 13th day of May, 1944.

JOHN B. COLPOYS,
United States Marshal
By WILLIAM S. HENNESSY, Jr.
Deputy United States
Marshal

Marshal's Fees: Service $2.00.

[Endorsed]: Filed May 19, 1944. [4]

[Title of District Court and Cause.]

MOTION TO DISMISS ON BEHALF OF THE UNITED STATES OF AMERICA

Now comes the defendant, the United States of America, by Edward M. Connelly, United States Attorney for the Eastern District of Washington, and appearing herein specially for this motion and for no other purpose, and objecting to the jurisdiction of the court, moves the court to dismiss the action as to said defendant for want of jurisdiction, on the grounds

(a) That the United States has not consented to be sued for or in connection with benefits under Title II of the Social Security Act;

(b) That Section 205(g) of the Social Security Act as amended (Title 42, US.C. Section 405 (g)) provides an exclusive procedure for reviewing decisions of the Social Security Board by a civil action in which the said Social Security Board is the party defendant, and no decision of the Board may be reviewed except as therein provided (Section 205(h) of the Social Security Act as amended, Title 42, U.S.C. Section 405 (b)).

EDWARD M. CONNELLY
United States Attorney
Attorney for Defendant,
United States of America.

Service acknowledged by receipt of copy this 30th day of June, 1944.

JUSTIN C. MALONEY
Attorney for Plaintiff

[Endorsed]: Filed June 30, 1944. [5]

[Title of District Court and Cause.]

ANSWER

The defendant Social Security Board of the United States of America, an agency of the United States, answers the complaint herein as follows:

First Defense

1. Plaintiff has no claim upon which relief can be granted, as shown by the provisions of the Social Security Act as amended; the Regulations of the Social Security Board promulgated thereunder; the transcript of the record upon which the decision complained of was made; and the findings and conclusions of the Social Security Board based thereon.

Second Defense

2. From August 1, 1938 to May 1, 1942, the decedent Dwight J. LaLone was in self-employment as a co-owner of and coadventurer in the Barrett-LaLone Insurance Agency, Spokane, Washington; his alleged compensation from the business did not constitute "wages" in "employment" within the definitions in Section 209 (a), (b) of the Social Security Act as amended (Title 42 U.S.C., Section

409 (a), (b)); nor did he render any services in employment. The facts as found by the Social Security Board so show; the findings are supported by substantial evidence and are conclusive.

3. The Social Security Board therefore found that in none of the fifteen calendar quarters from July 1, 1938 to March 31, 1942 did decedent Dwight J. LaLone receive $50 or more in wages so as to acquire a quarter of coverage (Section 209 (g) of the Social Security Act as amended, Title 42, U.S.C., Section 409 (g)). Since his services in the employ of the Vermont Loan & Trust Co. could account for only three quarters of coverage and since twenty-three quarters elapsed after 1936 and up to but excluding the quarter of death, the Social Security Board determined that decedent was not a fully insured individual who had the required eleven quarters of coverage.

4. By reason of the facts set forth in Paragraph 2 of this answer, the Social Security Board found that decedent was not paid wages of $50 or more for any of the ten calendar quarters between October 1, 1939 and March 31, 1942, which quarters are included within the twelve calendar quarters immediately preceding the quarter in which decedent died. It therefore determined that decedent had not been paid wages of $50 or more for each of not less than six [6] of such twelve calendar quarters and was not a currently insured individual (Section 209 (h) of the Social Security Act as amended, Title 42, U.S.C., Section 409 (h)).

5. The Board therefore properly decided that plaintiff's infant children were not entitled to child's insurance benefits (Section 202 (c) of the Social Security Act as amended, Title 42, U.S.C., Section 402(c)) as the children of a fully or currently insured individual.

Fourth Defense

6. Defendant admits the allegations of paragraphs I and IV of the complaint.

7. Answering paragraphs II and III of the complaint, defendant refers to the findings of fact of the Social Security Board contained in the transcript of the record filed herewith as a part of this answer as establishing the facts on which this action to review is based, and except as so established by said findings denies the allegations of said paragraphs of the complaint.

8. In accordance with the provisions of Title II, Section 205 (g) of the Social Security Act as amended (Title 42, U.S.C., Section 405 (g)) defendant files herewith as part of its answer a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based.

Wherefore, defendant prays for judgment dismissing the complaint with costs and disbursements, and for judgment in accordance with Section 205 (g) of the Social Security Act as amended, affirming the decision of the Social Security Board

complained of; and for such other relief as may be appropriate.

FRANCIS M. SHEA
Assistant Attorney General
EDWARD M. CONNELLY
United States Attorney
Attorneys for Defendant,
Social Security Board.

Service of this Answer is acknowledged by receipt of copy thereof July 3, 1944.

JUSTIN C. MALONEY
Attorney for Plaintiff

[Endorsed]: Filed July 3, 1944. [7]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Now comes the defendant, the Social Security Board, and respectfully moves this court for summary judgment in the above entitled action pursuant to Rule 56 of the Federal Rules of Civil Procedure, on the ground that there is no genuine issue as to any material fact and that the defendant is entitled to judgment as a matter of law; and for judgment in accordance with Section 205 (g) of the Social Security Act as amended (Title 42,

U.S.C., Section 405 (g)) affirming the decision of the Social Security Board herein complained of.

FRANCIS M. SHEA,
Assistant Attorney General
EDWARD M. CONNELLY,
United States Attorney
Attorneys for Defendant,
Social Security Board

NOTICE

Justin C. Maloney, Esquire
311 Empire State Building
Spokane, Washington

Please take notice that the points and authorities in support of the foregoing motion for summary judgment are hereto attached. The rules of the above-entitled court require that if you oppose the granting of this motion you shall, within the time required, or such time as the court may allow or the parties hereto agree upon, file in reply a memorandum of the points and authorities upon which you rely and serve a copy thereof upon the undersigned.

FRANCIS M. SHEA
Assistant Attorney General
EDWARD M. CONNELLY
United States Attorney
Attorneys for Defendant,
Social Security Board.

Served a true copy of the foregoing motion and notice and of the memorandum in support of de-

fendant's motion upon plaintiff's attorney by mailing a copy thereof in an envelop bearing Government frank and addressed to him at 311 Empire State Building, Spokane, Washington.

Service of the within notice, motion and memorandum is acknowledged by receipt of copies thereof July 3, 1944.

JUSTIN C. MALONEY,
Attorney for Plaintiff

[Endorsed]: Filed July 3, 1944. [8]

[Title of District Court and Cause.]

NOTICE OF AMENDMENT OF MOTION TO DISMISS ON BEHALF OF THE UNITED STATES OF AMERICA

To the Above Named Plaintiffs, and To Justin C. Maloney, Your Attorney of Record:

You and each of you will please take notice that a typographical error has been discovered in the original motion to dismiss on behalf of the United States of America, and the copy served upon you as follows: the last line of said motion wherein appear the words, "Section 405 (b)". The correct citation intended by the undersigned attorney for defendants, and the correct reading of said motion should be Section 405 (h).

You are further notified that at the time of argument of said motion, the undersigned attorney for the defendants will move the court for an order

permitting the amendment of said motion to dismiss on behalf of the United States of America as indicated herein.

EDWARD M. CONNELLY
Attorney for Defendants,
United States of America

Service of the foregoing Notice of Amendment of Motion to Dismiss on behalf of the United States of America, by receipt of copy thereof, is acknowledged this 28 day of August, 1944.

JUSTIN C. MALONEY
Attorney for Plaintiff

[Endorsed]: Filed Sept. 1, 1944. [9]

(Transcript of Proceedings on Hearings before Social Security Board submitted in accordance with the Stipulation as to Record on Appeal filed March 1, 1945,—in the form of a photostatic copy certified by the Chairman of the Appeals Council, Social Security Board.)

[Title of District Court and Cause.]

OPINION OF THE COURT

The defendants have moved for summary judgment on the ground that there is no genuine issue as to any material fact and that defendants are entitled to judgment as a matter of law. On December 7, 1942, plaintiff filed application under the

Social Security Act as amended (53 Stat. 1362, 42 U.S.C.A., Sections 401 et seq.) for child's insurance benefits (Section 202 (c) of the Act as amended, 42 U.S.C., Section 402 (c)) for four of her infant children, based upon the alleged status of her husband, Dwight J. LaLone, as an insured individual under the Act. He died on November 20, 1942.

On February 19, 1943, the Bureau of Old-Age and Survivors Insurance of the Social Security Board denied the application on the ground that the wage earner was not a fully or currently insured individual. Plaintiff disagreed with the determinations. She requested [11] and was given a hearing before a referee of the Social Security Board. The referee held that the wage earner was not a fully or currently insured individual for the reason that he was not an employee within the contemplation of the statute for a sufficient period prior to his death.

Thereupon plaintiff appealed to the Appeals Council of the Social Security Board which affirmed the referee on March 11, 1944, and adopted his findings of fact and statement of reasons. Under the practice of the Social Security Board this became the final decision of the Board. Plaintiff then brought this action to review the denial of her claims on behalf of her children, pursuant to the jurisdiction conferred by Section 205 (g) of the Social Security Act.

Section 205 (g) (Title 42, U.S.C., Section 405 (g), the jurisdictional provision of the Act which

authorizes the action to review the administrative decision, provides that "As part of its answer the Board shall file a certified copy of the transcript of the record including the evidence upon which the findings and decisions complained of are based." This has been done.

The applicable statute provides in part as follows: "Any individual * * * may obtain a review of such decision by a civil action commenced within sixty days * * *. Such action shall be brought in the District Court of the United States for the judicial district in which the plaintiff resides * * *. The Court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying or reversing the decision of the Board, with or without remanding the cause for a rehearing. The findings of the Board as to any fact, if supported by substantial evidence, shall be conclusive, * * *." 42 U.S.C.A. 405 (g).

Section 209 (a) of the Social Security Act as amended (Title 42, U.S.C., Section 409 (a) provides that "The term 'wages' means all remuneration for employment * * *." Section 209 (b) of the Social Security Act as amended (Title 42, U.S.C., Section 409 (b)) defines [12] employment as "any service performed after December 31, 1936, and prior to January 1, 1940, which was employment as defined in Section 210 (b) of the Social Security Act prior to January 1, 1940 * * *," and with exceptions not here pertinent, "any service of whatever nature, performed after December 31, 1939, by an employee for the person employing him

* * *." Section 210 (b) of the Social Security Act in effect prior to January 1, 1940, (49 Stat. 625) defines "employment" to mean, with exceptions not here pertinent, "any service of whatever nature performed within the United States by an employee for his employer." The pertinent regulations are found in the footnote.[1]

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[1] Regulations 90 and 91 relating to the definitions of employment are as follows: "Generally the relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which the result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. In general, if an individual is subject to the control of direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor, not an employee.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two individuals in fact stand in the relation of employer and employee to each other, it is of no consequence that the employee is designated as a part-

At the threshold of the case, I am met with defendant's contention that the order of the Social Security Board is conclusive and binding upon this Court. I give full recognition to the principle that resolving the question of the status of the wage earner belongs to the usual administrative routine of the Board. Gray v. Powell, 314 U.S. 402, 411. Unquestionably the Board's determination is to be accepted if it has warrant in the record and a reasonable basis in law. National Labor Relations Board v. Hearst Publications, Inc., 322 U.S. 111, 131. However, if the applicable statute and regulations properly interpreted forbid the method of analysis of the testimony followed by the Board, the Board's decision "would not be in accordance with law and the Court would be empowered to modify or reverse it. Whether it is true is a clear-cut question of law and is for decision by the courts." Dobson v. Commissioner, 320 U.S. 489, 492. After a careful review of the record in this case and a study of the referee's decision, I am convinced that the referee reached his conclusion without regard to the statute or regulations and that his determination has no reasonable basis in law and that his factual analysis has no warrant in the records.

First: A careful study of the referee's decision

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ner, coadventurer, agent, or independent contractor.

The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists."

can bring one to no other conclusion than that he totally ignored the applicable regulation. He concluded that LaLone was a partner or joint adventurer in the insurance business. He emphasized the importance of statements LaLone made in which he referred to himself as a partner. At no place in his decision did the referee refer to that portion of the regulation reading: "If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if two individuals in fact stand in the relation of employer and employee to each other, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor." [14] He gave no consideration to the testimony that the two Barretts had the right to control and direct the methods of operation, but stressed the testimony that such direction and control was infrequent. In this, the referee ignored the provision in the regulation reading: "In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has a right to do so." At no place in his decision did the referee discuss the testimony submitted as to the right of the Barretts to terminate the relationship on their own volition. In this the referee ignored the provision of the regulation reading: "The right to discharge is also an important factor indicating that the person possessing that right is an employer." The referee gave no

weight to the testimony showing that the Barretts furnished the office space out of which LaLone worked. In doing this, the referee disregarded that portion of the regulation reading: "Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work to the individual who performs the services." This interpretative regulation represents a "contemporaneous construction of the statute by the men charged with the responsibility of setting its machinery in motion, making the parts work efficiently and smoothly while they are yet untried and new," and is entitled to great weight. Norwegian Nitrogen Products Co. v. United States, 288 U. S. 294, 315; United States v. American Trucking Associations, Inc., 310 U. S. 534, 549; White v. Winchester Country Club, 315 U. S. 32, 41. Certainly the referee had no right to ignore that which the courts are commanded to respect.

Second: The referee's approach to the problem here involved completely ignored the broad aspects of the statute with the administration of which this agency is charged. The Social Security Act was passed to meet the challenge of the great economic and social problems which confronted the Nation as an outgrowth of the evils of unemployment, old-age penury and juvenile dependency. The best statement of [15] its objectives can be found in the testimony of Senator Wagner, the sponsor of the legislation, before the Senate Committee on Finance on January 22, 1935. (See: Hearings, Economic Security Act, United States Senate Committee on

Finance, 74th Cong. 1st Session, S. 1130, p. 2). Whether an individual comes within the classification of "employee" must be answered from the history, terms and purposes of the legislation. The word is not treated by Congress as a word of art, as having a definite meaning. Rather, it takes color from its surroundings in the statute where it appears. United States vs. American Trucking Associations, Inc., 310 U.S. 534, 545. The word derives meaning from the context of that statute which "must be read in the light of the mischief to be corrected and the end to be attained." South Chicago Coal & Dock Co., v. Bassett, 309 U. S. 251, 259. The Ways and Means Committee of the House of Representatives clearly demonstrated its purpose to cause a liberal interpretation of the word by this language, in its Report of June 6, 1939. (See: House Report No. 728, 76th Cong., 1st Session, Congressional Record, v. 84, pt. 6, p. 6711, et seq.): "The enactment of the Social Security Act marked a new era, the Federal Government accepting, for the first time, responsibility for providing a systematic program of protection against economic and social hazards." Later, in the same Report (see, p. 6729) that Committee said: "A restricted view of the employer-employee relationship should not be taken in the administration of the Federal old-age and survivors insurance system in making coverage determinations. The tests for determining the relationships laid down in cases relating to tort liability and to the common-law concept of master and servant should not be nar-

rowly applied." The defendants place great emphasis upon a statistical showing of the percentage of workers within the country not covered by the Act (Report, Social Security Board, 1943, p. 14). The restriction upon the coverage does not stem from the language Congress used in defining "employer," "employee," or "employment." It is the result of fifteen [16] restrictive exceptions withholding from coverage certain specified classes of workers. I am not entirely unfamiliar with the legislative background of this statute. A review of its legislative history must convince one that the restriction of the coverage was effectuated by opponents to the legislation unwilling to oppose its general purposes and forced to a program of legislative attrition by the means of restrictive amendments.

The referee, in analyzing the facts of this case, indisputably demonstrates his belief that such facts should be analyzed upon the basis of the common-law concept to the end that the employer-employee relationship should, if possible, be avoided. In so doing, he ran directly contrary to the command of the Supreme Court when, in discussing the National Labor Relations Act, it delineated the steps to be taken in determining the existence or non-existence of the employer-employee relationship. National Labor Relations Board v. Hearst Publications, supra. The language there used is applicable here. "Congress, on the one hand, was not thinking solely of the immediate technical relation of

employer and employee. * * * Congress had in mind a wider field than the narrow technical legal relation of 'master and servant', as the common-law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others. The question comes down therefore to how much was included of the intermediate region between what is clearly and unequivocally 'employment,' by any appropriate test, and what is as clearly entrepreneurial enterprise and not employment.

"It will not do, for deciding this question as one of uniform national application, to import wholesale the traditional common-law conceptions or some distilled essence of their local variations as exclusively controlling limitations upon the scope of the statute's effectiveness. To do this would be merely to select some of the local, hairline variations for nation-wide application and thus to reject others for coverage under the Act. That result hardly would be consistent with the statute's broad terms and purposes. [17]

"Congress was not seeking to solve the nationally harassing problems with which the statute deals by solutions only partially effective, * * * Yet only partial solutions would be provided if large segments of workers about whose technical legal position such local differences exist should be wholly excluded from coverage by reason of such differences. Yet that result could not be avoided, if choice must be made among them and controlled by them in deciding who are 'employees' within

the Act's meaning. Enmeshed in such distinctions, the administration of the statute soon might become encumbered by the same sort of technical legal refinement as has characterized the long evolution of the employee-independent contractor dichotomy in the courts for other purposes. The consequences would be ultimately to defeat, in part at least, the achievement of the statute's objectives. Congress no more intended to import this mass of technicality as a controlling 'standard' for uniform national application than to refer decision of the question outright to the local law."

The Circuit Court of Appeals for the Sixth Circuit had for decision a question of employer-employee relationship under the Fair Labor Standards Act. In its interpretation, it laid down this standard: "We are dealing, however with a specific statute which, like the National Labor Relations Act, 29 U.S.C.A. 151, is of a "class of regulatory statutes designed to implement a public, social, or economic policy through remedies not only unknown to the common-law but often in derogation of it. * * * If the Act presently considered, expressly or by necessary implication, brings within the scope of its remedial and regulatory provisions, workers in the status here involved, we are not concerned with the question whether a master-servant relationship exists under otherwise applicable rules of the common-law." Walling v. American Needlecrafts, 139 F. (2d) 60, 63.

The Circuit Court of Appeals for the Fourth Circuit had this statute before it for interpretation.

United States of America v. The Vogue, inc., decided November 13, 1944. That court, speaking [18] through Judge Parker, said: "The Social Security Act, like the Fair Labor Standards Act, and the National Labor Relations Act, was enacted pursuant to a public policy unknown to the common-law; and its applicability is to be judged rather from the purposes that Congress had in mind than from common-law rules worked out for determining tort liability * * *. Whatever conclusion might be drawn, however, as to whether Mrs. Fulton and Mrs. Woodfin were or were not independent contractors under the rules of the common-law as applied in the several states, we think there can be no question that they and their assistants should be held to be employees of plaintiff within the meaning of the Social Security Act as amended. 26 U. S. C. A. 1400, 1410. The purpose of that act was to provide old age, unemployment and disability insurance. * * *.

The inhospitable scope with which the referee viewed the statutory definition of "employee" is well demonstrated in the emphasis placed by him upon an unsigned written proposal proferred to La Lone by the Barretts.[2] As to this feature, I must

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[2] The extent to which the courts frown upon such an attitude of viewing a statute was best described by Mr. Justice Holmes, on Circuit, when he wrote in Johnson v. United States, 163 F. 30, 32: "A statute may indicate or require as its justification a change in the policy of the law, although it expresses that change only in the specific cases most likely to occur to the mind. The legislature has the power to decide what the policy of the law shall

confess that I [19] am handicapped by the awkward handling of the facts by the referee in his decision. The courts do not expect of an administrative agency that exactness or nicety which the appellate courts require of us inferior judges in distinguishing between findings of fact and conclusions of law. Nonetheless, it does not seem unreasonable to me to suggest that judicial review cannot be nullified by a confused mixture of findings, inferences and conclusions in the referee's decision. Beaumont, Sour Lake & Western Railway Company v. United States, 282 U. S. 74, 86; Florida v. United States, 282 U. S. 194, 215; United States v. Carolina Freight Carriers Corp., 315 U. S. 475, 488; United States v. Chicago, Milwaukee, St. Paul & Pacific R. Co., 294, U. S. 499, 510; Eastern-Central Motor Carriers Associa-

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be, and if it has intimated its will, however indirectly, that will should be recognized and obeyed. The major premise of the conclusion expressed in a statute, the change of policy that induces the enactment, may not be set out in terms, but it is not an adequate discharge of duty for courts to say: We see what you are driving at, but you have not said it, and therefore we shall go on as before." See, also, Frankfurter, J., in Keifer & Keifer v. Reconstruction Finance Corp., 306 U. S. 381, 391, and United States v. Hutcheson, 312 U. S. 219, 235; Taft, C. J., in United Mine Workers v. Coronado Coal Co., 259 U. S. 344, 385-389; Sutherland, J., in Funk v. United States, 290 U. S. 371, 381; Cardozo, J., in Van Beeck v. Sabine Towing Co., 300 U. S. 342, 350-351; Lord Birkenhead, L. C., in Bourne v. Keane (1919) A. C. 815, 830; Stone, The Common Law in the United States (1936) 50 Harv. L. Rev. 4, 13; Landis, Statutes and the Sources of Law, Harvard Legal Essays, p. 213.

tion v. United States, 321 U. S. 194, 212. This unsigned proposal was received in evidence and discussed in detail by the referee. I give full recognition to the principle that administrative agencies usually are not restricted to the same rules of evidence as apply in court proceedings and that the Board is permitted to consider that which would be objectionable in a court of law if it is of a kind on which fair-minded men are accustomed to rely in serious matters. Opp Cotton Mills, Inc. v. Administrator, 312 U. S. 126, 155; National Labor Relations Board v. Remington Rand, 94 F. (2d) 862, 873; Ellers v. Railroad Retirement Board, 132 F. (2d) 636, 639. However, here was a piece of evidence as to a mere offer to contract upon which clearly there was no meeting of the minds. The referee recognized this and, at one point, he indicated his intention to disregard it. Yet it is clear, from the reading of his decision, that the unsigned proposal was of controlling influence and weight with him. It is true that the witness Barrett testified that he thought the proposed writing stated his understanding with LaLone; yet the remainder of his testimony conclusively negatives such a conclusion by him. The [20] agreement was unsigned; its terms were disregarded; there was no justification for the referee emphasizing its importance as he did in reaching his conclusions. Undoubtedly, the referee properly received the proposed contract. I refer to the emphasis placed by him on it merely to indicate the restricted field of vision with which he approached the problem.

In my opinion, the testimony submitted here establishes an employer-employee relationship not unfamiliar to those who have had some practical business experience. F. S. Barrett and his son had been in the real estate business in Spokane for many years. As a young man LaLone went to work for them selling insurance. Under their direction and supervision, he was so successful that a local bank made him an offer of a position as manager of its insurance department. He left the Barretts under most friendly circumstances. Upon the failure of the bank, LaLone purchased the insurance business of the bank and started out on his own. Like so many men with sales ability, LaLone failed when faced with the responsibility of management. By 1938, his business reached a point where he owed substantial sums of money to the companies he represented for commissions he had collected. He faced serious consequences unless such commissions could be paid. In his decision, the referee stresses the value of LaLone's insurance assets. To the uninitiated, such insurance accounts might seem valuable. With commendable modesty the referee admitted his unfamiliarity with the insurance business. The fact is that there is nothing less valuable than the insurance accounts of an agent who becomes delinquent with the companies he represents. He not only loses the right of representation of those particular companies, but he loses the opportunity of representation of any other companies. What he has is worthless. This was the situation confronting LaLone in 1938. Then he went back to his old em-

ployers, the Barretts. They were willing to assist their former employee. They advanced the necessary funds with which he could make up his delinquencies. They took his notes for such amounts. They acquired the [21] right to enforce the payment of those notes by discontinuing the relationship that was established. He went to work for $200 a month. It is true that he hoped, as did the Barretts, that an insurance partnership later could be evolved. What he had at the time and during the entire time he was working there was simply a provisional arrangement whereby he could become a partner upon the success of the enterprise. The Barretts furnished the place at which the business was transacted; LaLone adjusted his working hours to comply with the office hours of the Barretts. The Barretts decided on the important questions of policy and had the right to decide on all questions of policy. It is true that they used the name Barrett-LaLone Insurance Agency. That, however, was simply a business device intended for the purpose of developing and retaining any business that might be secured. It is true LaLone had the right to sign checks along with Mr. Barrett. That is no proof of a partnership relationship. Many employees are given the dubious honor of signing checks without any proprietary interest in the business. The referee made much of the fact that, without the Barretts' consent, LaLone sold his insurance accounts to the Vermont Loan and Trust Company in 1942, and paid back to the Barretts the amount of money they

had loaned to him. I can readily understand how anyone inexperienced in business practices would construe this to mean that at all times LaLone maintained a proprietary interest in his business and was working for himself. Actually, all he had was the right to recapture these accounts if they became valuable and he could secure a sum sufficient to pay off his debt. This case presents an excellent illustration of what was discussed by Judge Parker in an address before the section on Patent, Trademark and Copyright Law of the American Bar Association (American Bar Association Journal, v. 30, p. 623). Judge Parker was there discussing the proposed creation of a patent court. He said: "What is needed there is not so much a court of experts, as a court of wide experience and sound common sense. Everybody knows that the training [22] which makes a man an expert necessarily narrows his field of vision and renders him impractical in matters outside his specialty. * * * What is needed is not the bookish approach of the scientist to the problem but the common sense approach of a court accustomed to deal with all sorts of human relationships." There was nothing unusual or uncommon about this relationship between the Barretts and LaLone. He had worked there before. When he got into financial difficulties, they were willing to help him out. Of course, they permitted him to make a deal whereby he could better his situation. That did not mean that he had been in partnership with them in an insurance agency. As long as he was there, he was simply working there. LaLone

had no financial responsibility. If the arrangement had resulted in debt, the Barretts would have paid the debts and would have discharged him. They controlled and directed his activities; they furnished him a place to work; he worked on a definite salary which he drew regardless of profits. Situations such as this are a matter of daily occurrence in the business world. It would require the most tortuous interpretation of the statute and regulation to conclude other than that LaLone was an employee. He had the right to hope that, if the business succeeded, the relationship would ripen into a partnership or joint adventure. That time never came while he was working there.

The motion for summary judgment must be denied.

L. B. SCHWELLENBACH
United States District Judge

November 27, 1944.

[Endorsed]: Filed Nov. 27, 1944. [23]

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now the plaintiff above named and respectfully moves the Court for summary judgment in the above entitled action pursuant to rule 56 of the Federal Rules of Civil Procedure in her favor; and for judgment in accordance with Section 205 (g) of the Social Security Act as amended (Title 42,

U.S.C.A. Section 405 (g)) reversing the decision of the Social Security Board herein complained of.

This motion is based on the records, files and proceedings herein, the pleadings of the parties and the certified copy of the transcript of the record including the evidence on file herein.

JUSTIN C. MALONEY
Attorney for Plaintiff.

Copy received December 5, 1944.
EDWARD M. CONNELLY

[Endorsed]: Filed Dec. 5, 1944. [24]

In the District Court of the United States for the Eastern District of Washington, Northern Division

No. 404

AUGUSTA J. LaLONE, on behalf of JULIE S. LaLONE, JANET D. LaLONE, JILL R. LaLONE, and LANCE D. LaLONE,

Plaintiff,

vs.

THE UNITED STATES OF AMERICA, THE SOCIAL SECURITY BOARD OF THE UNITED STATES OF AMERICA,

Defendants.

JUDGMENT

The above entitled matter having come regularly on for hearing and determination before the Court

the plaintiff appearing by her attorney, Justin C. Maloney, and the defendants appearing by Edward M. Connelly, United States Attorney, and the pleadings of the parties being on file herein, and the defendant, The Social Security Board of The United States of America having filed as part of its answer herein a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of herein are based, and both plaintiff and defendants having moved for summary judgment in their respective favor, and the Court having heard the argument of counsel, and briefs and memorandums of authorities having been submitted to and considered by the Court and the Court having fully considered the matter and being fully advised in the premises and having filed herein the written opinion of the Court, It Is Hereby

Ordered, Adjudged and Decreed that the motion for summary judgment of the defendants in their favor be and the same is hereby denied.

It Is Further Ordered, Adjudged and Decreed that the motion for summary judgment of the plaintiff in her favor be and the same is hereby granted.

It Is Further Ordered, Adjudged and Decreed that the decision of the Social Security Board of the United States of America in the cases of Augusta J. LaLone on behalf of Julie S. LaLone, Case No. 12-268, Janet D. LaLone, case No. 12-269, Jill R. LaLone, case No. 12-270, Lance D. LaLone, case No. 12-271, for Child's Insurance Benefits, he and the same are hereby reversed. And the defendant, The Social Security Board of The United States of

America be and it is hereby directed to certify to the Managing Trustee the names and addresses of the parties plaintiff herein as entitled to receive Child's Insurance Benefits as provided by law and the order of this Court.

Done in open court this 22nd day of December, 1944.

L. B. SCHWELLENBACH
Judge.

Copy Received 12/22/44.
EDWARD M. CONNELLY
U. S. Atty.

Presented by:
JUSTIN C. MALONEY

[Endorsed]: Filed Dec. 22, 1944. [25]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice Is Hereby Given that the United States of America and The Social Security Board of the United States of America, defendants above named, hereby appeal to the Circuit Court of Appeals for the Ninth Circuit from the final Judgment which was entered in this action on December 22, 1944.

Dated this 21st day of February, 1945.
EDWARD M. CONNELLY
United States Attorney for the Eastern District of Washington, Attorney for Appellants.

Copy of the above Notice of Appeal mailed to Justin C. Maloney, Attorney for Plaintiff, this 21st day of February, 1945.

EVA M. HARDIN,
Deputy Clerk.

[Endorsed]: Filed Feb. 21, 1945. [26]

[Title of District Court and Cause.]

STATEMENT OF THE POINTS UPON WHICH APPELLANTS INTEND TO RELY UPON APPEAL TO THE CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

Come Now the appellants by their attorney, Edward M. Connelly, the duly appointed, qualified and acting United States Attorney for the Eastern District of Washington, and make the following statement of the points on which they intend to rely on the appeal:

I.

The District Court erred in failing to hold that the Social Security Board's findings that decedent Dwight J. LaLone was self-employed and a joint-venturer in the insurance business were supported by substantial evidence and conclusive.

II.

The District Court erred in holding that the Social Security Board had applied an improper rule of law, had failed to follow National Labor Relations

Board v. Hearst Publications, Inc., 322 U.S. 111, and had ignored the applicable regulation in determining said deceased individual's employment status for Social Security purposes.

III.

The District Court erred in failing to give due weight to the evidence supporting the Social Security Board's findings, but instead, selecting evidence tending to support other findings and conclusions.

IV.

The District Court erred in entering judgment for plaintiff.

Dated this 21st day of February, 1945.

EDWARD M. CONNELLY

United States Attorney for the Eastern District of Washington, Attorney for Appellants.

Service of the foregoing Statement of Points upon which Appellants intend to rely upon Appeal is admitted by receipt of copy thereof this 21st day of February, 1945.

JUSTIN C. MALONEY

Attorney for Augusta J. LaLone, Julie S. LaLone and Lance D. LaLone, Plaintiffs and Appellees.

[Endorsed]: Filed Feb. 21, 1945. [27]

[Title of District Court and Cause.]

STIPULATION AS TO RECORD

Comes now the parties above named, Augusta J. LaLone, on behalf of Julie S. LaLone, Janet D. LaLone, Jill R. LaLone and Lance D. LaLone, plaintiff and appellee in the above-entitled proceeding, by his attorney Justin C. Maloney, Esquire, and the United States of America and the Social Security Board of the United States of America, defendants and appellants, by their attorney, Edward M. Connelly, United States Attorney for the Eastern District of Washington, and hereby agree and stipulate that the following parts of the record, proceedings and evidence shall be and are designated to be included in the record on appeal, to-wit:

1. Transcript of proceedings on hearing before the Social Security Board of the United States of America and titled as follows: "Federal Security Agency, Social Security Board, Office of Appeals Council.."

DECISION OF APPEALS COUNCIL

In the cases of Augusta J. LaLone on behalf of

	Case No.	Claim For:
Julie S. Lalone (Claimant)	12-268	Child's Insurance Benefits
Janet D. LaLone (Claimant)	12-269	Child's Insurance Benefits
Jill R. LaLone (Claimant)	12-270	Child's Insurance Benefits
Lance D. LaLone (Claimant)	12-271	Child's Insurance Benefits

Dwight J. LaLone
(Wage Earner)
(Social Security Account No. 539-16-1206)

which said transcript constitutes the basis of appeal from the appeal council of the Social Security Board to the United States District Court for the Eastern District of Washington. It is especially stipulated, however, that this transcript of proceedings in the Social Security Board need not be made a part of the printed record on appeal, but may be reproduced in the form of photostatic copies. It is further stipulated that the parties must otherwise comply with the rules of the United States Circuit Court of Appeals for the Ninth Circuit with reference to the preparation of record on appeal save [28] with respect to this particular transcript.

2. Plaintiff's Complaint filed with the Clerk of the United States District Court for the Eastern District of Washington on May 8, 1944.

3. Summons with attached copy of United States Post Office receipt for registered mail.

4. Defendant's Answer.

5. Defendant's Motion for Summary Judgment.

6. Notice of Amendment of Motion to Dismiss on Behalf of the United States of America.

7. Opinion of the Trial Court.

8. Plaintiff's Motion for Summary Judgment.

9. Judgment filed December 22, 1944.

10. Notice of Appeal.

11. Statement of the Points Upon Which Appellants Intend to Rely upon Appeal to the Circuit Court of Appeals for the Ninth Circuit.

12. Stipulation as to Record.

Dated this 1st day of March, 1945.

EDWARD M. CONNELLY
Attorney for Defendants
JUSTIN C. MALONEY
Attorney for Plaintiff

[Endorsed]: Filed March 1, 1945. [29]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America,
Eastern District of Washington—ss.

I, A. A. LaFramboise, Clerk of the District Court of the United States for the Eastern District of Washington, do hereby certify the foregoing typewritten pages numbered from 1 to 29 inclusive, to be a full, true, correct and complete copy of so much of the record, papers and all other proceedings in the above entitled cause, as are necessary to the hearing of the appeal therein, in the United States Circuit Court of Appeals, as called for by the stipulation of counsel for appellant and appellee, as the same remain of record and on file in the office of the Clerk of the said District Court, and that the same constitute the record on appeal from the judgment of the District Court of the United States for the Eastern District of Washington, to the Circuit Court of Appeals for the Ninth Judicial Circuit, at San Francisco, California.

I further certify that in accordance with the stip-

ulation of counsel, I herewith enclose a photostatic copy of the Transcript of Proceedings before the Social Security Board of the United States of America.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court at Spokane in said District this 6th day of March, 1945.

[Seal] A. A. LaFRAMBOISE
Clerk, U. S. District Court,
Eastern District of Washington. [30]

[Endorsed]—No. 10998. United States Circuit Court of Appeals for the Ninth Circuit. United States of America and the Social Security Board of the United States of America, Appellants, vs. Augusta J. LaLone, on behalf of Julie S. LaLone, Janet D. LaLone, Jill R. LaLone and Lance D. LaLone, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the Eastern District of Washington, Northern Division.

Filed March 8, 1945.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

United States Circuit Court of Appeals
for the Ninth Circuit

No. 10998

UNITED STATES OF AMERICA and THE SOCIAL SECURITY BOARD OF THE UNITED STATES OF AMERICA,
Appellants,

v.

AUGUSTA J. LaLONE, on behalf of JULIE S. LaLONE, JANET D. LaLONE, JILL R. LaLONE and LANCE D. LaLONE,
Appellees.

DESIGNATION OF POINTS UPON WHICH APPELLANTS WILL RELY UPON APPEAL

To the Honorable Judges of the United States Circuit Court of Appeals, to the above-named appellees and to Justin C. Maloney, your attorney of record:

You and each of you will please take notice that the points upon which appellants will rely upon appeal are those points which appear in the Transcript of Record, heretofore served and filed, following service of Notice of Appeal in the above-entitled proceedings.

Dated at Spokane, Washington, this 13th day of March, 1945.

EDWARD M. CONNELLY
United States Attorney for the Eastern District of Washington, and Attorney for Appellants.

Service acknowledged by receipt of copy this 13th day of March, 1945.

JUSTIN C. MALONEY
Attorney for Appellees.

[Endorsed]: Filed March 15, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

APPLICATION TO RELIEVE PARTIES FROM PRINTING CERTAIN PORTIONS OF RECORD

Come now the parties above-named by their respective attorneys and stipulate and respectfully make application to the Court for relief from printing and producing the transcript of proceedings on hearing before the Social Security Board of the United States of America.

This application is made upon the ground that said transcript, in addition to the written reproduction of testimony in question and answer form, contains many documents, is a bulky and voluminous transcript and has already been filed in the Court and one copy furnished appellants' attorney, which he in turn made available to appellee's counsel pending arguments, and that counsel for both parties and the Clerk of the District Court are familiar with the transcript in its present form and that to disturb its present form by printing it in record form as required by the rules of Court for such records would tend to confusion and entail an unnecessary

and excessive expense which would serve no useful purpose either to this Court or to the counsel who will prepare briefs and arguments on appeal from said transcript.

EDWARD M. CONNELLY
Attorney for Appellants.
JUSTIN C. MALONEY
Attorney for Appellee.

So Ordered:

CURTIS D. WILBUR
Senior United States Circuit Judge.

[Endorsed]: Filed March 15, 1945. Paul P. O'Brien, Clerk.

No. 10998

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA AND SOCIAL SECURITY BOARD, APPELLANTS

v.

AUGUSTA J. LALONE, ON BEHALF OF JULIE S. LALONE, JANET D. LALONE, JILL R. LALONE, AND LANCE D. LALONE, APPELLEES

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLANTS AND APPENDIX

FRANCIS M. SHEA,
Assistant Attorney General.
EDWARD M. CONNELLY,
United States Attorney.
Attorneys for Appellants.

Of Counsel:
ARNOLD LEVY,
Special Assistant to the Attorney General.
HUBERT H. MARGOLIES,
Attorney, Department of Justice.

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In the United States Circuit Court of Appeals for the Ninth Circuit

No. 10998

UNITED STATES OF AMERICA AND SOCIAL SECURITY BOARD, APPELLANTS

v.

AUGUSTA J. LALONE, ON BEHALF OF JULIE S. LALONE, JANET D. LALONE, JILL R. LALONE, AND LANCE D. LALONE, APPELLEES

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF FOR APPELLANTS AND APPENDIX

JURISDICTIONAL STATEMENT

The action was instituted in the United States District Court for the Eastern District of Washington against the United States and the Social Security Board to review, pursuant to Section 205 (g) of the Social Security Act as amended (42 U. S. C. § 405 (g)) a denial of child's insurance benefits. A motion to dismiss the action as to the defendant United States as in violation of Section 205 (h) (R. 8) was

not acted upon by the District Court.[1] The jurisdiction of this court to review the order of the District Court is sustained by Section 205 (g) of the Social Security Act, as amended, and Section 128 of the Judicial Code (28 U. S. C. § 225).

STATEMENT OF THE CASE

This is an appeal from an order and final judgment of the United States District Court for the Eastern District of Washington, entered December 22, 1944, denying the motion of the defendant Social Security Board for summary judgment and for judgment affirming the decision of the Social Security Board complained of in the action; granting plaintiff's cross-motion for summary judgment; and reversing the decision of the Social Security Board (R. 33–35). The order and final judgment adjudges that plaintiff's children are entitled to child's insurance benefits under the Social Security Act, based upon the status of their father, Dwight J. LaLone, as an insured individual at the time of his death, and directs the Social Security Board "to certify to the Managing Trustee the names and addresses of the parties plaintiff herein as entitled to receive" such benefits.

The decision of the Social Security Board (Tr. 2, 8–13[2]) reversed by this judgment found that from

[1] In view of the fact that consent to sue the United States is expressly withheld by Section 205 (h) of the Social Security Act as amended (42 U. S. C. § 405 (h)) and that no order was entered against the United States, the manifest jurisdictional defect in retaining the United States as a party to the proceeding will not be noticed further.

[2] References to the printed record will be abbreviated R. * * * References to the photoprint transcript of the administrative pro-

August 1938 to May 1942, LaLone was an entrepreneur having a proprietary interest in the Barrett-LaLone Insurance Agency and not in covered employment under the Social Security Act. Exclusive of this period he could be neither "fully insured" (Section 209 (g) of the Social Security Act as amended) nor "currently insured" (Section 209 (h) of the Social Security Act as amended). Consequently his children were not entitled to child's insurance benefits (Section 202 (c) of the Social Security Act as amended).

A. The administrative proceedings

Dwight J. LaLone died on November 20, 1942. On December 7, 1942, plaintiff filed application under Title II of the Social Security Act as amended (53 Stat. 1362, 42 U. S. C. §§ 401 et seq.) for child's insurance benefits (Section 202 (c) of the Act as amended, 42 U. S. C. Section 402 (c)) on behalf of four infant children. On February 19, 1943, the Bureau of Old-Age and Survivors Insurance of the Social Security Board denied the application on the ground that he was not an employee of F. S. Barrett & Co., and did not qualify as a fully or currently insured individual. As permitted by the regulations, plaintiff requested reconsideration. On reconsideration, it disallowed the claim on April 26, 1943, con-

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ceedings will be abbreviated Tr. * * * Pursuant to the order of this court dated March 8, 1945, the printing of the transcript of the proceedings before the Board has not been required. Photoprint positive copies have, however, been furnished to the clerk of this court. References to specific pages of the transcript will be to the handwritten numbers appearing near the top of the outside margin.

cluding that LaLone "was a party to a joint venture and, therefore, self-employed rather than an employee" (Tr. 113–114). Disagreeing with the determinations, plaintiff requested and was given a hearing before a referee of the Social Security Board. The evidence before the referee at the hearing on November 15, 1943, including the testimony of plaintiff and three other witnesses in her behalf, may be summarized as follows:[3]

For some time prior to August 1, 1938, LaLone operated an insurance business that dealt in all forms of insurance except life, under the name of the D. J. LaLone Insurance Agency (Tr. 24–25). He was then indebted to several insurance agencies to the extent of more than two thousand dollars. His accounts were worth $3,600 (Tr. 57–58). To protect his representation, he approached F. S. Barrett & Co., for whom he had once worked. F. S. Barrett & Co. was primarily a realty company but it had a small, unprofitable insurance business (Tr. 36). F. S. Barrett & Co. took LaLone's notes and advanced the money with which to meet his obligations on promissory notes payable in a year (Tr. 39–40, 55–56, 120–123).

The two separate insurance businesses were pooled as the Barrett-LaLone Insurance Agency (Tr. 40, 50). LaLone moved his office to the real estate office of F. S. Barrett & Co., taking his stenographer and some of his office furniture with him (Tr. 25, 29–30, 42), together with his insurance accounts, far exceed-

[3] The evidence is summarized in the referee's decision, Tr. 8–12.

ing the F. S. Barrett & Company's insurance business in value (Tr. 36). A bank account in the name of Barrett-LaLone Insurance Agency was established for the handling of all receipts and disbursements of the Agency. All checks had to be signed by LaLone and either F. S. Barrett, Sr., or F. S. Barrett, Jr., president and secretary, respectively, of the Barrett Co. (Tr. 40–41). Loans were obtained on two signatures, LaLone's and one of the Barretts' (Tr. 51–52). The insurance operations were virtually the exclusive concern of LaLone. Separate accounts and stickers on the business originating with each constituent were maintained (Tr. 43–44, 66).

No formal agreement was ever executed. In an unsigned agreement (Tr. 116–119) which completely embodied and *"clearly reflected"* the terms of the arrangement (Tr. 38–39) F. S. Barrett & Co. was given an option to buy a one-half interest for $1,800 after repayment of its loan to LaLone, if the parties should then decide to continue the Barrett-LaLone Insurance Agency. That agreement recited the desire of the parties to consolidate their insurance businesses and to "form a new insurance agency as of the first day of August 1938, to be known as the Barrett-LaLone Insurance Agency, the business of which shall be conducted in the office of the first party (F. S. Barrett & Co.) under the general management of the second party (LaLone) in which agency the first and second party shall have an equal interest, and the second party shall devote his entire time to the business of said insurance agency." The advances

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were not to exceed $2,148. LaLone was to receive $200 a month out of net profits, and the Agency was to "continue for the period of one year, or until such further time as all advances by the first party have been repaid, at which time the parties hereto agree that said Agency may be dissolved or may be continued, in the discretion of either party, and if it is decided to continue said Agency, the first party shall pay to the second party the sum of Eighteen Hundred Dollars ($1,800.00) and shall thereupon own a one-half interest in said Agency. Upon a dissolution of said Barrett-LaLone Insurance Agency each of the parties hereto shall hold as his own all insurance business turned over to said Agency by him and all new business brought to said Agency by him * * *." (Tr. 118).

All profits realized from the business were to be applied to the payment of LaLone's notes. Thus the profits on the insurance business derived from the F. S. Barrett & Co.'s accounts (which had never been lucrative, Tr. 36) would also be applied in payment on the notes. The Barrett Company was looking to a "built-up insurance business eventually" (Tr. 47) as its inducement and consideration. During the pooling F. S. Barrett & Co. returned only part of the profit as income. It was at LaLone's instance that "partnership" profits were so returned (Tr. 73–74).

> F. S. Barrett, Sr. He said in order to keep things straight we should show this partnership that there was a profit there to our account.

As far as receiving anything, we never received a cent. That was a matter of bookkeeping.

REFEREE. But you considered that you had an interest in the profits of that agency?

F. S. BARRETT, Sr. Yes.

REFEREE. Despite the terms of that agreement whereby he was to receive all the profits?

F. S. BARRETT, Sr. Yes. Well, it was 50–50. He showed so much profit, and then we added it up 50 to us and 50 to him. I think it was on our books too.

A separate charge was made by F. S. Barrett & Co. to Barrett-LaLone Insurance Agency for rent and telephone (Tr. 45). The charges for "office rent and phone rent" were paid currently by the Agency to the Company (Tr. 51). LaLone was allowed $200 a month out of net profit (Tr. 74), paid by check from the Barrett-LaLone account. On several occasions when the Barrett-LaLone Insurance Agency had insufficient funds in its bank account to pay LaLone's drawing, money was borrowed from the bank upon the note of the Insurance Agency, signed by LaLone and one of the Barretts and repaid out of subsequent profits of the Agency; on just one occasion F. S. Barrett & Co. advanced a small amount to Barrett-LaLone (Tr. 51–52).

The Barrett-LaLone Insurance Agency maintained its own records, which LaLone took with him upon dissolution of the Agency (Tr. 129). Its affairs were not reflected on the books and records of F. S. Barrett & Co. other than to show the loan to LaLone and other

transactions between the Agency and the corporation (Tr. 50–51). The Agency was publicly held out as a distinct firm. It had its own bank account and advertised the business in the name of the Agency. Contracts for calendars and billboards to advertise the Agency (not the corporation) were signed by LaLone on behalf of the Agency (Tr. 42–43). Barrett, Sr., testified that the Agency account was still open for the deposit of collections on bills outstanding and that plaintiff as administratrix had an interest in realizations (Tr. 61–63).

Barrett, Jr. considered that LaLone "was acting as the manager of the insurance business." He was thereupon asked by the referee: "As your employee?" Whereupon Barrett, Sr., interjected: "No" (Tr. 56). Barrett, Jr., did not take issue.

In May 1942, without consulting the Barretts, LaLone sold his business to the Vermont Loan & Trust Co. for $5,000, paying the notes held by the Barrett Co. out of the purchase price. The buyer took over all the insurance accounts LaLone brought to Barrett-LaLone and those he had developed; the remainder reverted to the F. S. Barrett Co. (Tr. 31–32, 47–48, 58, 129).

One week before the dissolution of the Barrett-LaLone Insurance Agency, LaLone wrote the Bureau of Internal Revenue (Tr. 124, Exhibit X) with reference to employer's identification numbers:

> We have what is known as Barrett-LaLone Insurance Agency, and the owners are F. S. Barrett & Co. and D. J. LaLone, and this is an entirely separate organization. Therefore, there

> should be a number for the Barrett-LaLone Insurance Agency and also for F. S. Barrett & Co.

Social Security tax reports for the years prior to 1942 were not filed. No returns have ever been filed listing LaLone as an employee of F. S. Barrett & Co., of the Barretts individually, or of Barrett-LaLone Insurance Agency, except that he was listed in tax returns (Tr. 76; 125–129, Exhibit Y) by Barrett-LaLone Insurance Agency for the quarter ended March 31, 1942, and for the second quarter up to May 15, 1942, to which LaLone attached a statement (Tr. 129, part of Exhibit Y) reading as follows:

> The partnership of the Barrett-LaLone Insurance Agency was dissolved as of May 1, 1942. The salary of Dwight J. LaLone ceased on that date, but Dorothy May Ebeling was paid wages until May 15, 1942.
>
> The records of the Barrett-LaLone Insurance Agency are kept by D. J. LaLone, at 1114 Old National Building, Spokane, Washington.

Taxes in connection with these two quarters, the only two filed, were paid out of the Barrett-LaLone Insurance Agency funds (Tr. 70).[4]

Prior to August 1, 1938, LaLone was admittedly self-employed and no contention to the contrary has been advanced. His employment with the Vermont

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[4] After the filing of plaintiff's application, a statement was made out on January 15, 1943, on Social Security Board Form OAC–1001, in the course of the usual administrative inquiry of each alleged employer, signed "Barrett-LaLone Ins. Agency by F. S. Barrett," and filed with the Board, purporting to show wages paid LaLone commencing in the third quarter of 1938 and ending May 1, 1942 (Tr. 93, 95, 99).

Loan & Trust Company from May 1 to November 20, 1942, would yield only three quarters of coverage [5] of the 11 quarters of coverage after December 31, 1936, that would be needed for fully insured status (Section 209 (g) of the Act as amended) (Tr. 113–114)[6] and only two of the twelve calendar quarters immediately preceding the quarter in which LaLone died of the six required for currently insured status (Section 209 (h) of the Act as amended) (Tr. 113). Entitlement to child's insurance benefits is conditioned upon the wage-earner's having died a fully or currently insured individual. Unless the decedent was in covered employment during the continuance of the arrangement with F. S. Barrett & Co., he could not have been fully or currently insured.

On these facts the referee denied the claims on December 20, 1943. He found that "LaLone was not an employee, but as a member of a partnership or joint venture was an employer" (Tr. 12), and that "LaLone owned a proprietary interest in the Barrett-LaLone Insurance Agency, and therefore could not be an employee thereof" (Tr. 13).

Plaintiff thereupon appealed to the Appeals Council of the Social Security Board. On March 11, 1944, the Council affirmed the decision of the referee and adopted his findings and decision as its own (Tr. 2).

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[5] Quarters in which he was paid wages of $50 or more in covered employment.

[6] After 1936 and up to but excluding the quarter in which he died there were twenty-three quarters. Half must be quarters of coverage. Since the number of quarters (23) is odd, the number is reduced by one before division. Section 209 (g); Regulation 3 of the Social Security Board, Section 403.201 (c) (1).

In conformity with the practice of the Social Security Board the decision of the Appeals Council became the final decision of the Board.

B. The proceedings in the district court

Thereafter and within the time permitted by Section 205 (g) of the Social Security Act as amended (42 U. S. C. § 405 (g)) plaintiff commenced this action in the district court to review and set aside the decision of the Social Security Board (R. 2–4). The Board answered the complaint (R. 9–12) and pursuant to the requirements of Section 205 (g) filed as part of its answer a certified transcript of the administrative record (R. 11).

Section 205 (g) of the Act as amended does not contemplate a trial *de novo*. It provides that the reviewing court "shall have power to enter upon the pleadings and transcript of the record, a judgment affirming, modifying or reversing the decision of the Board." It further provides that the findings of the Board as to any fact, if supported by substantial evidence, shall be conclusive.

In view of the limited nature of judicial review in proceedings under Section 205 (g) and the fact that the record before the court consists only of the pleadings and the administrative transcript, it has been the practice of the Social Security Board to move for summary judgment pursuant to Rule 56 (b) of the Federal Rules of Civil Procedure as soon as issue is joined. *Walker* v. *Altmeyer,* 137 F. (2) 531 (C. C. A. 2); *Morgan* v. *Social Security Board,* 45 F. Supp. 349 (M. D. Pa.); cf. *National Broadcasting Co.* v. *United*

States, 319 U. S. 190, 227. Such practice was followed in this case (R. 12–13). The plaintiff cross-moved for summary judgment in her favor (R. 32–33).

C. The decision of the district court [7]

The district court in an extended opinion (R. 15–32) reversed the Board's determination as without basis in law and without warrant in the record, and following closely plaintiff's analysis of the alleged facts (Tr. 4–6), stated that "It would require the most tortuous interpretation of the statute and regulation to conclude other than that LaLone was an employee." Apparently referring to Section 209 (b) (1)–(15) of the Act as amended (42 U. S. C. 409 (b) (1)–(15)), the court said:

> The restriction upon the coverage does not stem from the language Congress used in defining "employer," "employee," or "employment." It is the result of fifteen restrictive exceptions withholding from coverage certain specific classes of workers.

The court purported to follow the pertinent regulations but inadvertently cited Treasury Regulations 90 and 91, applicable to the tax provisions, instead of Social Security Board Regulations 2 and 3. The court reasoned as follows:

1. The referee did not refer to the provision, found in the Treasury and Board regulations defining employment status, that "If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than

[7] Reported in 57 F. Supp. 947.

that of employer and employee is immaterial," and "totally ignored" the applicable regulation. He ignored the Barretts' alleged right to control, but stressed the infrequency of its exercise; he ignored the Barretts' right to terminate the relationship "on their own volition"; he ignored the fact that the Barretts furnished the office space.

2. The referee "ignored the broad aspects of the statute with the administration of which this agency is charged." In violation of the Supreme Court's command in *Labor Board* v. *Hearst Publications,* 322 U. S. 111, the referee gave the Act "inhospitable scope."

3. The referee's findings handled the facts inexpertly and without comprehension, laying undue stress on the unsigned written proposal. To people versed in the ways of business, the evidence established an employee relationship. The contrary view of the referee was ascribed to inexperience, impracticality, and a "restricted field of vision."

On December 22, 1944, the court granted plaintiff's motion for summary judgment and directed the Board to certify to the Managing Trustee the names of the infants as entitled to receive child's insurance benefits.

SPECIFICATION OF ERRORS RELIED UPON

The district court erred—

(1) In failing to hold that the Social Security Board's finding that decedent was self-employed, a joint venturer in the insurance business, not an em-

ployee, was supported by substantial evidence and conclusive.

(2) In holding that the Social Security Board had applied an improper rule of law, had failed to follow *National Labor Relations Board* v. *Hearst Publications, Inc.,* 322 U. S. 111, and had ignored the applicable regulation in determining LaLone's employment status for Title II purposes.

(3) In failing to give any weight to the evidence supporting the Social Security Board's findings, but instead, substituting the court's own inferences and evaluation of the evidence for the Board's.

STATUTES AND REGULATIONS INVOLVED

For the convenience of the court the statutes and regulations herein involved are set forth in an appendix hereto (pp. 45–50, *infra*).

QUESTIONS PRESENTED

The only questions presented on this appeal are (1) was the administrative determination on the undisputed facts that LaLone was self-employed and not in the employ of another so erroneous as to permit the district court to say that as a matter of law it was not supported by substantial evidence and to go on and to make substituted findings of its own, and (2) was the district court justified in imposing its own views of coverage upon the Board as a matter of law.

It is submitted that in administering the Act, the Board has constantly refused to permit its coverage determinations to be dominated by restrictive common law tests for ascertaining the master and servant relation but that, adopting the most liberal construction,

entrepreneurs are not within the ambit of the Social Security Act, and LaLone unquestionably fell in the ranks of the self-employed, as a working partner or joint venturer; that the *Hearst* case, 322 U. S. 111, and the regulations afford no open sesame to coverage for LaLone and other self-employed individuals. Indeed, the necessity for more expansive tests to cover those not comprehended by common law tests assumes the continuance of groups not satisfying the more inclusive tests of employee status. The *Hearst* case clearly has not forced abandonment of all standards for coverage determination in benefit proceedings. Even if it be deemed to establish the rule of the most liberal construction, it would still leave room for the agency to which administration is confided to determine that a particular individual was a self-employed working partner or coadventurer not rendering services for, and not in the employ of, another.

SUMMARY OF ARGUMENT

1. The differences are misconceived if they are laid to divergent views as to the scope of coverage under the Social Security Act rather than as to application. Long before the decision by the Supreme Court in the *Hearst Publications* case, concepts substantially the same as Mr. Justice Rutledge's had been adopted by the Social Security Board. The Board disclaims as a ground for appeal any reliance on narrow views of coverage.

Contrary to intimations in the opinion below, the terms "employment," "employer," and "employee" connote an exclusion of those not qualifying as em-

ployees by the tests applied by the Board. A rule of liberal construction is not in itself decisive of status in specific instances. Unreserved acceptance of all the implications of the *Hearst* case does not predetermine employee status for a co-owner of a business. The court fallaciously interpreted the *Hearst* case as virtually obliterating the distinction between persons in the employ of another and the self-employed. Actually, while the Supreme Court recognized that the class of employed persons might be viewed expansively by an administrative agency, it did not require the agency to lose sight of the limitations upon coverage attributable to the implicit restriction to those in an employment status, wholly apart from more specific exclusions.

2. Appraising the evidence, the Board found that decedent was self-employed. That finding was supported by substantial evidence before an agency well-grounded in the correct principles to be applied. By the standard of substantial support in the evidence, the Board's finding must be upheld. Actually it is supported by the great preponderance of the evidence. The court below, however, chose to search the record for evidence to support its own theory of the relationship, to make unwarranted assertions as to the evidence, to select particular excerpts from the regulations, and in so doing to tax the Board with failing to adhere to the precepts of the *Hearst* case and the regulations. By those very precepts, nevertheless, LaLone must be found to have been self-employed and, therefore, not in covered employment during the

critical period from August 1938 to May 1942. The *Hearst* case requires that the administrative agency's determination be accepted if it has "warrant in the record and a reasonable basis in law."

3. Particularly with respect to a program of such vast proportions as the Old-Age and Survivors Insurance program, intrusion by the courts, and the substitution of judicial disposition for that of the administrative body, should be discountenanced. The courts, dealing with these cases sporadically, do not share the advantages of familiarity with the background and knowledge of the practical consequences that will ensue from any particular construction. Reversal of the Social Security Board may only be justified when the Board's findings of fact are unsupported by evidence, or when it has applied the wrong principle of law. In the case at bar, the Board has manifestly applied the correct principles, and adhered to its own regulations. In no sense was there any error of law. The only question is whether the Board is to be permitted to apply fair tests of coverage (and noncoverage) even when its finding results in a denial of benefits.

Point I

The Board was warranted in determining that persons sustaining the relation to a business that LaLone did in the instant case are not wage earners under the Social Security program

Entitlement and benefits payable under the Old-Age and Survivors Insurance program are determined and measured by wages paid. "Wages" are defined as

"remuneration for employment." (Section 209 (a) of the Act as amended, 42 U. S. C. 409 (a)). "Employment" is defined as "any service * * * performed * * * by an employee for the person employing him." (Section 209 (b) of the Act as amended, 42 U. S. C. 409 (b)). (Prior to January 1 1940, it was defined as "any service * * * performed * * * by an employee for his employer.") Self-employed individuals are not within the scope nor within the intention. They are not in receipt of remuneration for services performed in the employ of another; they work for themselves. Apart from their definitional exclusion, self-employed individuals are commonly regarded as typically better able to protect themselves from the hazards of insecurity and their earnings as being highly differentiated, in character and amount, from the wages of industrial workers receiving periodic remuneration while employed. *Ridge Country Club* v. *United States,* 135 F. (2) 718 (C. C. A. 7). It is no new discovery that their "economic situation may not be one whit better than that of many workers covered by the compulsory system." Report of Committee on Economic Security (1935) p. 35.

> A considerable part of the population, however, is outside of Title II. Included in this excluded group are all agricultural workers, domestic servants, employees of charitable, educational and religious organizations, *all self-employed persons,* farmers, professional people and proprietors and entrepreneurs. These

> groups include almost half of all persons "gainfully occupied" as this term is used in the United States Census. Senate Report No. 628, on H. R. 7260, which became the Social Security Act of 1935, 74th Cong., 1st Sess., p. 9. [Italics supplied.] [8]

The Social Security Board in its Eighth Annual Report, 1943 (p. 14) recognizes the desirability of extending coverage:

> Self-employed persons are often thought of in terms of well-to-do business and professional men whose work is "independent." Yet the 10.0–11.7 million persons excluded from substantially all participation in social insurance by reason of their self-employment represent for the most part operators of small farms and stores, repair services, and the like, whose returns are small and whose "independence" is largely illusory * * *
>
> Letters received by the Board indicate that many owners of little unincorporated businesses look longingly at the protection which wage earners have under the Social Security Act and other social insurance legislation. Often they are contributing under such laws in behalf of their employees while they themselves have no

[8] See also computations and tables in Report No. 628 of Senate Committee on Finance, May 13, 1935 (to accompany H. R. 7260), pp. 26, 27, and Report No. 615 of House Committee on Ways and Means, April 5, 1935 (to accompany H. R. 7260), pp. 14, 15, which indicate that in addition to the specially excluded types of service, it was intended that the individuals not within the coverage of title VIII and title IX of the original act would be "owners, operators, self-employed (including the professions)."

> adequate means of making provision for their old age or assuring the support of their families if they should die.[9]

Not to belabor the point, the court below cited as the best statement of the objectives of the Social Security Act, the testimony of Senator Wagner on his unenacted bill, S. 1130, before the Senate Committee on Finance on January 22, 1935 (See Hearings, Economic Security Act, Committee on Finance, 74th Cong., 1st Sess. S. 1130). Senator Wagner said at p. 2 (the court's page reference) that "Lost profits may be regained upon the upward swing of the business cycle, but the working day that is lost is gone forever," and specifically noted (p. 8) "The compulsory national system of old-age insurance will not provide for those who engage in business for themselves."

The concept of the exclusion of the self-employed was basic. It never occurred to Congress that any one would contend that persons who were self-employed would be entitled to the same social security benefits[10] (or liable for the Federal Insurance Con-

[9] "The statute does not comprehend storekeepers, professional men engaged in making their own livelihood, profiting or losing from the exercise of their own judgment, capital, and enterprise." *Ridge Country Club* v. *United States*, 135 F. (2) 718 (C. C. A. 7); *Whalen* v. *Harrison*, 51 F. Supp. 515 (N. D. Ill.); *Nevins* v. *Rothensies*, 58 F. Supp. 460 (E. D. Pa.)

[10] As a supplement to the system applicable to wage-earners it was originally planned to *sell* deferred life annuities to individuals on a cost basis. In its Report to the President (1935) the Committee on Economic Security, p. 5, stated that "The primary purpose of the plan is to offer persons not included within the compulsory system a systematic and safe method of providing for their old age." This plan, devised to take in the self-employed,

tributions tax on employees, 26 U. S. C. § 1400) as those employed by another. In view of the foregoing, appellants must take exception to the statement of the court below that "The restriction upon the coverage does not stem from the language Congress used in defining 'employer,' 'employee,' or 'employment.' It is the result of fifteen restrictive exceptions withholding from coverage certain specified classes of workers." As the Board has said (Social Security Yearbook, 1941, p. 51): "Coverage under the old-age and survivors insurance program is based on 'employment,' and services in employment can be rendered only by 'employees.' But not all services rendered by employees constitute 'employment' as that term is defined in title II of the Social Security Act." See also Social Security Yearbook for the calendar year 1942 (June 1943), p. 26, Table 8.[11]

The cases interpreting the Social Security Act and related social legislation have recognized that people in business for themselves, whether operating as sole proprietors or as co-proprietors in a partnership or

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was embodied in title XI of H. R. 7260. It was not, however, enacted as a part of the Social Security Act of 1935. In its recommendations on unemployment compensation (p. 10) the Committee noted that "Even with compulsory coverage large groups of workers cannot readily be brought under unemployment compensation; among them employees in very small establishments, *and, of course, all self-employed persons.*" See also Senate Report No. 628, 74th Cong., 1st Sess., pp. 3, 9–10, 52.

[11] Neither "employer" nor "employee" is specifically defined in the Social Security Act. See *Independent Oil Co.* v. *Fly*, 141 F. (2) 189 (C. C. A. 5); *Spillson* v. *Smith*, 147 F. (2) 727 (C. C. A. 7); *Los Angeles Athletic Club* v. *United States*, 54 F. Supp. 702, 704 (S. D. Calif.).

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joint adventure, are not covered. See *Sweet* v. *Bureau of Old-Age and Survivors Insurance,* decided August 31, 1942, United States District Court for the District of Idaho, C. C. H. Unemployment Insurance Service, Vol. 1, Fed. Par. 6348.21; *Sharp* v. *United States,* United States District Court for the District of Florida, decided January 21, 1942, C. C. H. Unemployment Insurance Service, Vol. 1, Fed. Par. 5054.511; C. B. XV–2, 405, S. S. T. 23; *Industrial Commission* v. *Bracken,* 83 Colo. 72, 262 Pac. 521; *Gibson-McPherson-Sutter Live Stock Co.* v. *Murphy,* 384 Ill. 414, 51 N. E. (2) 514; *Dezendorf* v. *National Casualty Co.,* 171 So. 160 (La. Ct. App.); *Auten* v. *Michigan Unemployment Compensation Commission,* — Mich. —, 17 N. W. (2) 249; *Chambers* v. *Macon Wholesale Grocer Co.,* 334 Mo. 1215, 70 S. W. (2) 884; *Skouichi* v. *Chic Cloak & Suit Co.,* 230 N. Y. 296, 130 N. E. 299; *Lyle* v. *H. R. Lyle Cider Co.,* 243 N. Y. 257, 153 N. E. 67; *Coccaro* v. *Herman Coal Co.,* 145 Pa. Super. 81, 20 Atl. (2) 916; *Peterson* v. *Department of Labor & Industries,* 160 Wash. 454, 295 Pac. 172; cf. *Estate of Tilton,* 8. B. T. A. 914, 917.

The Social Security Board may not be said to have accepted restrictive common law views. In the Social Security Yearbook for the calendar year 1940 (June 1941), pp. 74–75, the Board candidly rejected the approach of respondeat superior:

> In the field of social insurance the only control which appears to be relevant is general economic control and the dependence of an individual for his livelihood upon the person claimed to be the employer. It is somewhat

> incongruous that rights and liabilities under a modern program designed to protect individuals from insecurity in old age or to help bridge the gap between jobs—problems which are peculiarly the product of current forms of industrial organization—should be determined by any concepts which originated in the nineteenth century. In such a program the only individuals who could logically be excluded on the basis of their general status are the self-employed or those who are engaged in operating independently established businesses.

See also Social Security Yearbook for the calendar year 1941 (June 1942) pp. 47–52. But the Board cannot remain unaware that no matter how broad the coverage of "employees" may be, the need for deciding whether the individual is in the employ of another is not obviated. Indeed, far from dispensing with decision of that question, more recent cases have accentuated its importance by giving the "independently established" test greater emphasis than the delusively simple and telescoped "control test." The control test was formerly applied pretty much as a matter of course,[12] with the completely unpredictable results that might be anticipated from a test dependent on the distinction between *result* and *details and means*. Cf. *McGowan* v. *Lazaroff,* C. C. A. 2, March 26, 1945, C. C. H. Unemployment Insurance Service, Vol. 1, Fed. Par. 9186. It is perhaps significant that in its footnote 1, quoting Treasury Regulations 90 and 91 on employment, the court below

[12] See Social Security Yearbook (1940), p. 76.

(which took the referee to task for not referring to a portion of the regulation) omitted the following paragraphs:

> Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.
>
> Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

N. L. R. B. v. *Hearst Publications,* 322 U. S. 111, implements the important role that the legislative purpose must play in the establishment of the boundaries of coverage by endowing the administrative agency with power to effectuate the objectives of the Act. It is the very opposite of a mandate to reject the well-settled distinction between employees and the self-employed. "Independent contractor" may be ambiguous—it may be used to describe employer or employee because generically it excluded only *servants* at common law, a narrower conception than employees. But the term "employee" cannot absorb the "self-employed."[13] The *Hearst* case itself dealt with the

[13] See Social Security Yearbook, 1941, p. 49 "* * * insofar as tort or workmen's compensation liability is concerned, use of the term 'independent contractor' as the antithesis of 'employee' probably does not seriously affect the validity or desirability of the legal conclusion reached in most cases. Experience has made it manifest, however, that serious consequences flow from the

problem of cases "in the borderland between what is clearly an employer-employee relationship and what is clearly one of independent entrepreneurial dealing" (p. 121) and Justice Rutledge stated at p. 124 (with reference to the Labor Act):

> Congress had in mind a wider field than the narrow technical legal relation of "master and servant," as the common law had worked this out in all its variations, and at the same time a narrower one than the entire area of rendering service to others. The question comes down therefore to how much was included of the intermediate region between what is clearly and unequivocally "employment," by any appropriate test, and what is as clearly entrepreneurial enterprise and not employment.

The controversy between the parties to this appeal is not over a pure question of law. Whether a coownership or an employer-employee relation exists is a question of fact. *Walling* v. *Plymouth Mfg. Co.,* 139 F. (2) 178 (C. C. A. 7) affirming 46 F. Supp. 433

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transfer of these concepts to a system of old-age and survivors insurance which seeks to secure wage earners and their dependents against the economic consequences of old age and death. In this program the extent and nature of the control reserved or exercised over the individual who performs the service would seem to be a factor of no great relevance in ascertaining whether he should be covered. The proper inquiry would seem to be whether he was a wage earner dependent upon the continuance of an economic association with one whose business was furthered by the services he performed * * * Without prejudice to the view that coverage of the 'self-employed,' on economic and legal grounds, may be amply justified, it would seem that the initial inclusion of all gainful workers excepting self-employed individuals (and certain special groups) apart from considerations of tort liability is reasonable * * *"

(N. D. Ind.) cert. den. 322 U. S. 741; *San Francisco Iron & Metal Co.* v. *American Milling Co.,* 115 Cal. App. 238, 1 P. (2) 1008, 1011 (joint venture); *Ryder* v. *Jacobs,* 196 Pa. 386, 46 Atl. 667 (partnership); *Wyoming-Indiana Oil Co.* v. *Weston,* 43 Wyo. 526, 7 Pac. (2) 206, 208 (joint venture). The issue is whether, having regard to all the complex of attributes of the relationship of LaLone to the Barrett-LaLone Insurance Agency, and to all the characteristics of the Agency, the court below could say as a matter of law that LaLone had no proprietary interest in the Agency, but instead was merely an employee of a distinct entity of which he was not a member, with assurance that a contrary view was altogether unsound and unsupportable. So long as substantial evidence may be shown for holding that an individual was in entrepreneurial enterprise as a co-owner, that situation does not obtain. It is significant that the court did not specify who the employer was, whether (1) F. S. Barrett & Co., (2) the Barretts individually, or (3) Barrett-LaLone Insurance Agency.

The *Hearst* case does not relieve the trier of fact from coming to an over-all judgment on the facts and circumstances (*United States* v. *Aberdeen Aerie, No. 24,* decided by this court on February 16, 1945, C. C. H. Unemployment Ins. Service, Vol. 1, Fed. Par. 9177; *Anglim* v. *Empire Star Mines,* 120 F. (2) 914, 917 (C. C. A. 9)) nor does it establish any presumption of coverage militating against giving appropriate effect to the judgment and primary jurisdiction of the administrative agency. *National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 130.

Neither this court (see *Anglim* v. *Empire Star Mines,* 129 F. (2) 914; *Matcovich* v. *Anglim,* 134 F. (2) 834, cert. den. 320 U. S. 744; cf. *N. L. R. B.* v. *Long Lake Lumber Co.,* 138 F. (2) 363 (C. C. A. 9); *Emard* v. *Squire,* 58 F. Supp. 281 (W. D. Wash.)) nor any Circuit Court, certainly not the Fourth Circuit in *United States* v. *Vogue, Inc.* (145 F. (2) 609, cited by the court below, involving a seamstress in a Lynchburg store and her helpers) has attributed such breadth to the Social Security Act's coverage. The court below stands alone in purporting to find that the scope is intrinsically, and apart from administrative construction, so far reaching. The cases have almost uniformly justified denials of coverage on the basis of the applicable regulations' adoption of concepts not too remote from those of the common law, referring to the contrast in the regulations between employees and independent contractors.[14] The Act has been interpreted judicially for almost ten years without any intimation that "employment" *as a matter of law* included persons in LaLone's situation.

Notwithstanding its liberal approach, the district court's intrusion into the administration of the Social

[14] See, e. g., *Texas Co.* v. *Higgins*, 118 F. (2) 636 (C. C. A. 2); *Radio City Music Hall Corp.* v. *United States*, 135 F. (2) 715 (C. C. A. 2); *Glenn* v. *Beard*, 141 F. (2) 376 (C. C. A. 6); *United States* v. *Mutual Trucking Co.*, 141 F. (2) 655 (C. C. A. 6); *Anglim* v. *Empire Star Mines*, 129 F. (2) 914; cf. *Emard* v. *Squire*, 58 F. Supp. 281 (W. D. Wash.). Although the Board disagrees with many of the decisions, and many of them were rendered before the Supreme Court handed down its opinion in the *Hearst* case, the difference in construing the regulations is too marked to be overlooked. The uniform trend in the decisions has been to the effect that literally read, the regulations seem to reflect a desire not to innovate in the interpretation of employment status.

Security program goes far beyond the limited participation envisaged for the courts by Section 205 (g) of the Act and by general rules for judicial review of administrative determinations. It interposes a serious obstacle to efficient unified administration of the Act by injecting the many district courts into the administration of Title II of the Social Security Act. It censures a responsible finding of fact for no better reason than that it does not find in favor of coverage. If it is allowed to stand as a precedent the Board may be whipsawed for denial of coverage in benefit (entitlement) appeals and for favoring coverage in directing deductions for earnings of $15 or more in covered employment,[15] to the detriment of consistency, uniformity, and responsible administration.

Point II

LaLone was a self-employed individual and the Board properly so found

The facts in this case are that at a time when he was in debt LaLone pooled his insurance business with that of F. S. Barrett and Company. He was installed as the active managing partner and allowed $200 a month out of the profits. The Barrett-LaLone Insurance Agency clearly was not intended to be a mere adjunct of the realty company. *Cf. Gray* v. *Powell,* 314 U. S. 402, 414. Although the Barrett Company financial contribution and its power to demand payment of LaLone's notes at any time after

[15] Section 203 (d) (1) of the Social Security Act as amended, 42 U. S. C. § 403 (d) (1), requires loss of a monthly benefit for any month in which the individual renders services (in covered employment) for wages of $15 or more.

maturity may have given it a potentially dominant voice in the event of disagreement, it seems clear that, as the referee found, LaLone's interest was that of a co-owner. His sale of his interest for $5,000 in May, 1942, is conclusive that he had a proprietary interest and was not an employee of another from August 1, 1938, to May, 1942.[16] The indicia of a joint adventure are clearly present.

In the face of LaLone's contribution of an established business to the common enterprise, and his proprietary interest in the subject matter which would give rise to profits, it cannot be successfully maintained that Barrett, Sr. and LaLone misconceived the relation[17] and that LaLone was an employee engaged in another's business. The sharing of the profits strongly evidences that LaLone was a joint adventurer or partner along with F. S. Barrett Company.[18] Although no express agreement was ever reached as to losses,[19] the insurance accounts LaLone put into the insurance agency were at the risk of the business. Both parties considered they were to share in losses,

[16] If he was not in the employ of another he was unable to gain quarters of coverage or quarters for which wages of not less than $50 were paid him. It must appear "to the satisfaction of the Board" that payments for services have been made. Sections 209 (g), (h) of the Act as amended.

[17] Cf. *Schneider* v. *Schneider*, 347 Mo. 102, 146 S. W. (2) 584.

[18] LaLone would have shared even in the profits that were to go to the Barrett Company because those profits would discharge his obligation on the notes.

[19] The absence of an agreement to share losses is not inconsistent with a joint venture. *First Mechanics Bank* v. *Com'r.*, 91 F. (2) 275, 279 (C. C. A. 3); *Eagle Star Ins. Co.* v. *Bean*, 134 F. (2) 755 (C. C. A. 9).

as appears from the fact that LaLone as well as one of the Barretts signed the notes every time money was borrowed by the Barrett-LaLone Insurance Agency (Tr. 51–52). Moreover, no losses were sustained (Tr. 44–45, 48–49). The court nevertheless found (57 F. Supp. 947, 954) that "LaLone had no financial responsibility. If the arrangement had resulted in debt, the Barretts would have paid the debts and would have discharged him."

In violation of the restricted scope of judicial review prescribed by the Supreme Court in a long line of cases (see, *e. g., Federal Trade Comm.* v. *Educational Society,* 302 U. S. 112, 117) the court below paid no attention to the evidence in support of the Board's findings. Instead, it searched the record for evidence to sustain the contentions of the plaintiff, drew its own inferences to establish a departure from the applicable regulations, and put an unprecedented construction on the regulations themselves. On the evidence in the record as distinguished from judicial notice of such items as the worthlessness of accounts in the hands of a delinquent agent and his complete absence of bargaining power, inferences that will often be, and in this case were, at variance with the facts, it may be said that the overwhelming weight of the evidence supported the finding of self-employment. The Social Security Board, by virtue of the Congressional delegation to it of the administration of the benefit provisions, has made hundreds of thousands of coverage determinations and has gained therefrom a specialized knowledge of the variations. Even if the

facts were as consistent with the *employee* hypothesis as the court supposed, it may be doubted that the strictures upon the referee's inexperience in business practices were warranted, or that a relationship so dependent on intention could be categorically characterized as *employment*. The court's ingenious reconstruction of the alleged facts does not exclude the Board's more tenable finding. This "penumbra of the employment relation" did not escape the notice of the Supreme Court in the *Hearst* case (p. 126):

> Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight.

Coverage turns largely upon the interpretation to be given a regulation of the Social Security Board defining "employment." The Board should be considered the best judge of its meaning; its interpretation should not be disregarded by the courts unless clearly erroneous or arbitrary. *Norwegian Nitrogen Products Co.* v. *United States,* 288 U. S. 294; *N. L. R. B.* v. *J. S. Popper, Inc.,* 113 F. (2) 602 (C. C. A. 3); cf. *Fawcus Machine Co.* v. *United States,* 282 U. S. 375; *Costanzo* v. *Tillinghast,* 287 U. S. 341. "In any case of ambiguity in a regulation established by an administrative officer, his interpretation is entitled to great

weight." *Consolidated Water Power Co.* v. *Bowles,* 146 F. (2) 492, 494 (Em. Ct. App.).

As for the payment of Social Security taxes (totalling $12.00) for two quarters in 1942, the erroneous collection or receipt by Government agents cannot enlarge the scope and application of the tax statute. Much less may it enlarge the scope of the distinct, although related, benefit statute. These payments were made voluntarily and without any assessment or determination by the Bureau of Internal Revenue. For any erroneous payment of taxes the Internal Revenue Code provides a remedy in the form of a claim for refund (26 U. S. C., Int. Rev. Code, § 1421). The Old-Age and Survivors Insurance Program can give credit only for such earnings as constitute wages. Cf *Punke* v. *Murphy,* 267 App. Div. 673, 675, 48 N. Y. Supp. (2) 347, 349. The considerations to be applied by the Board are indicated in Title II of the Act. Significantly, the taxes in question were paid by Barrett-LaLone Insurance Agency, of which LaLone was one of the owners, not by F. S. Barrett & Co. Even after LaLone's death, F. S. Barrett executed and filed with the Social Security Board statements (Form OAC–1001) purporting to show payment of wages to LaLone during 1938–1942, not by F. S. Barrett & Co., but by Barrett-LaLone Insurance Agency (Tr. 92, 95, 99).

The District Court said (57 F. Supp. 947, 950) that the referee

> * * * gave no consideration to the testimony that the two Barretts had the right to control and direct the methods of operation, but

> stressed the testimony that such direction and control was infrequent. In this, the referee ignored the provision in the regulation reading: "In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has a right to do so."

Nothing in the referee's decision warrants any assertion by the court as to the consideration the referee gave to such alleged testimony. The referee's decision contains no reference whatever to frequency or infrequency of any alleged direction or control. Moreover, the evidence shows *consultation among* the Barretts and LaLone, *not* control or direction by the Barretts over LaLone (Tr. 41, 49–50). The evidence is at least as consistent with the theory of consultation between co-partners or joint adventurers, as with the theory of an employer giving instructions to an employee, or the employee consulting his employer for the purpose of obtaining instructions; especially so when read and considered in the light of overwhelming other evidence establishing LaLone's proprietary interest in the insurance business. Because F. S. Barrett & Co. had advanced LaLone money upon his promissory notes, maturing in one year (but not paid until LaLone terminated the venture by selling his insurance accounts to a third party for $5,000), and because LaLone may have deemed it advisable to avoid any serious falling out with the Barretts so long as he wanted to continue the venture, it is possible that the Barretts were in a position to have the final say as to what should be done, but that is no different from the

situation which frequently exists between partners or joint adventurers. In any event, the lower court exceeded its power in substituting its own contrary finding of "control" for the referee's finding of "consultation," rather than control.

The District Court stated (at p. 950) that "The referee gave no weight to the testimony showing that the Barretts furnished the office space out of which LaLone worked," and (p. 954) that "The Barretts furnished the place at which the business was transacted," and that (p. 954) "They furnished him a place to work," and also said that the referee thus "disregarded that portion of the regulation reading: 'Other factors characteristic of an employer are the furnishing of tools and the furnishing of a place to work to the individual who performs the services.'" The court not only misconstrued the evidence regarding the office space, but even relied upon it as evidencing an employer-employee relationship. In fact, the full evidence regarding the office space supports the referee's decision. The evidence shows that F. S. Barrett & Co. charged the Barrett-LaLone Insurance Agency for rental and telephone (Tr. 45), and that these charges for "office rent and phone rent" were paid currently by the Barrett-LaLone Insurance Agency to F. S. Barrett & Co. (Tr. 51). Thus, it is not true that the "Barretts furnished office space out of which LaLone worked," except in the sense that the venture—Barrett-LaLone Insurance Agency (of which LaLone was a member)—was a lessee or tenant of F. S. Barrett & Co.

The District Court concluded that LaLone "went to work for $200 a month" (p. 953), and that "he worked on a definite salary which he drew regardless of profits" (p. 954). However, his so-called "salary" was not payable and was not paid by F. S. Barrett & Co. nor by the Barretts, nor with funds supplied by them, and he was not on their pay roll. This is obvious from the evidence regarding the only tax returns (Tr. 125–129), and the statements on Form OAC–1001 (Tr. 93, 95, 99), as well as from the evidence that LaLone's "salary" was payable only from profits of the Barrett-LaLone Insurance Agency ("He was to receive $200 a month out of the net profit," Barrett, Sr., testified. Tr. 74. See also Tr. 117), and was actually paid only by checks of the Agency drawn upon its own bank account, derived from insurance premiums (Tr. 51), which had to be signed by LaLone and co-signed by Barrett, Jr., or Barrett, Sr. (Tr. 40–41). Moreover, on several occasions when the Barrett-LaLone Insurance Agency had insufficient funds for LaLone's "salary," the salary of his secretary and other expenses of said Agency, money was borrowed from the bank upon notes of the Barrett-LaLone Insurance Agency, signed by LaLone and one of the Barretts. The loans were repaid out of subsequent profits of said Agency (Tr. 51–52). There is also the significant testimony that on one occasion when the Barrett-LaLone Insurance Agency had insufficient funds to pay "those salaries and those expenditures," F. S. Barrett & Co., "*advanced* the Barrett-LaLone Insurance Agency a small amount of money—maybe

$200 additional'' (Tr. 51). All this clearly shows that neither the Barretts nor LaLone considered F. S. Barrett & Co., the corporation, or the Barretts personally, obligated to pay LaLone's "salary," and that LaLone could look only to the profits of the Barrett LaLone Insurance Agency for his "salary", which is in accordance with the unsigned agreement (Tr. 117).

Thus, it is obvious that the court's statements regarding LaLone's "salary" erroneously convey the impression that LaLone's "salary" was paid by F. S. Barrett & Co. or "the Barretts," and "regardless of profits," when as a matter of fact they paid him no salary whatever, and were astute enough to so arrange matters that neither F. S. Barrett & Co., nor the Barretts personally, would be responsible for his "salary." That "salary" was merely a working partner's or coadventurer's allowance or drawings and not a true salary in the sense of an employee's remuneration.

The District Court asserted (p. 950) that "At no place in his decision did the referee discuss the testimony submitted as to the right of the Barretts to terminate the relationship on their own volition. In this the referee ignored the provision of the regulation reading: 'The right to discharge is also an important factor indicating that the person possessing that right is an employer.'" A partnership may always be terminated at the will of any partner, although such termination may be a breach of the agreement, subjecting the withdrawing partner to an action for damages. Assuming, however, that the court referred to a right to terminate the relationship without breach, this,

again, is characteristic of most partnerships and many joint ventures. In this case, moreover, it is not true that the parties were free to terminate the relationship at will. Since the notes LaLone executed to F. S. Barrett & Co. (Tr. 55–56, 120–123), did not mature until one year after date, the court's inference (p. 953) that "They acquired the right to enforce payment of those notes by discontinuing the relationship that was established," is improper. It should be noted that paragraph 8 of the agreement provided that the Barrett-LaLone Insurance Agency should have a minimum term of one year or continue until the repayment of the loan, if that was later, at which time the parties would determine whether to dissolve or to continue the venture (Tr. 118). It is true that the agreement was never formally executed, but the testimony that it represented the actual relationship that was intended, coupled with all the other evidence (e. g., the entry into the relationship, the making of the loan by F. S. Barrett & Co., the execution and delivery by LaLone of one-year notes covering said loan, the relationship for nearly four years, and the circumstances of simultaneous dissolution of the relationship and discharge of the debt by payment from the proceeds of LaLone's sale of his insurance accounts (Tr. 58)) is at least substantial evidence that the relationship was not intended to be terminable at will. Assuming, however, that it was so terminable, that would be at best a factor to be weighed by the referee rather than the court in the light of all circumstances. In consequence, it cannot be said that the referee erred in giving more

weight to other factors clearly indicating that LaLone was a co-owner of the insurance business and not an employee. It was beyond the power of the court to re-evaluate the evidence.

Point III

Findings of the Board supported by substantial evidence are conclusive

Congress has committed the determination of rights to Title II benefits to the Social Security Board. Section 205 (g) of the Social Security Act as amended contains the usual limitation on judicial review of administrative decisions and provides that the "findings of the Board as to any fact, if supported by substantial evidence shall be conclusive." The Board's determination must be sustained if supported by substantial evidence. *Walker* v. *Altmeyer,* 137 F. (2) 531 (C. C. A. 2); *Social Security Board* v. *Warren,* 142 F. (2) 974 (C. C. A. 8); see *Pacific Gas & Electric Co.* v. *S. E. C.,* 127 F. (2) 378, 382 (C. C. A. 9); *Matter of Morton,* 284 N. Y. 167, 30 N. E. (2) 369.

The finality accorded to the Board's findings by the Act extends to its inferences or conclusions so long as they are "reasonably reached upon due consideration" and after a hearing. *Gray* v. *Powell,* 314 U. S. 402; *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251, 257; *Dobson* v. *Com'r.,* 320 U. S. 489, 501–3; *Com'r.* v. *Scottish American Investment Co., Inc.,* 323 U. S. 119; *N. L. R. B.* v. *Hearst Publications,* 322 U. S. 111; *Walker* v. *Altmeyer, supra; Social Security Board* v. *Warren, supra.*

The court below approached the problem as one of substituting its own inferences and implications from the evidence for those drawn by the Board. This approach was plain error. *Federal Trade Comm.* v. *Algoma Co.,* 291 U. S. 67, 73. In *Com'r.* v. *Scottish American Investment Co.,* 323 U. S. 119, the Supreme Court reversed the Third Circuit which had said (142 F. (2) 401, 403) "With no real dispute as to the facts, the problem here resolves itself into just what is meant by the language of [Treasury Regulations 101, Article 231 (1)] defining such office or place of business * * *."

The Supreme Court said (323 U. S. at p. 124):

> The judicial eye must not in the first instance rove about searching for evidence to support other conflicting inferences and conclusions which the judges or the litigants may consider more reasonable or desirable. It must be cast directly and primarily in support of those made by the Tax Court. If a substantial basis is lacking the appellate court may then indulge in making its own inferences or conclusions or it may remand the case to the Tax Court for further appropriate proceedings. But if such basis is present the process of judicial review is at an end * * * The factual situation is too decisive and too varied from case to case to warrant a great expenditure of appellate court energy in unraveling conflicting factual inferences.

In the present case the Board's inferences were not merely permissible from the evidence; they were compelled. There is no latitude for judicial reexamina-

tion of those inferences and implications by what amounts to a judicial trial *de novo* on the administrative record, particularly under a statute rendering findings of the Board conclusive if supported by substantial evidence.

Courts may not substitute their judgment even where the evidentiary facts are undisputed. In *Gray* v. *Powell,* 314 U. S. 402, 412, the court said:

> Although we have here no dispute as to the evidentiary facts, that does not permit a court to substitute its judgment for that of the Director * * *. It is not the province of a court to absorb the administrative functions to such an extent that the executive or legislative agencies become mere fact-finding bodies deprived of the advantages of prompt and definite action.

In *Walker* v. *Altmeyer,* 137 F. (2) 531 (C. C. A. 2) the district court in a proceeding under Section 205 (g) of the Social Security Act reversed the administrative finding as to employment in a case where the individual, an attorney, continued to perform services after qualifying and so was subject to loss of benefits for months in which he rendered services for wages of $15 or more (Section 203 (d) (1) of the Act as amended, 42 U. S. C. 403 (d) (1). The Court of Appeals, reinstated the Board's decision, saying (pp. 533–534):

> The facts underlying that decision which were found on substantial evidence were, of course, binding upon the district court. That is not the question this appeal raises. The error into which the court fell was not that of making

> new and contrary findings but of substituting new and contrary inference of its own from the found facts which led it to reverse the administrative conclusion which had been reached as to the employee status of the plaintiff. That sort of action went beyond the power of the district court to review in such a suit as this. It was the judgment of the administrative body as to an employer-employee relationship rather than that of the court which the statute made effective provided that judgment was based upon conclusions reasonably reached upon due consideration of all relevant issues presented after parties in interest had been given a fair hearing or a fair opportunity to be heard upon the facts and the applicable law. *Gray* v. *Powell,* 314 U. S. 402.

The Supreme Court has consistently given effect to the administrative judgment in cases like that now at bar. But it has on various occasions apparently interchangeably labeled the issue as "fact" (*Virginian Ry.* v. *United States,* 272 U. S. 658, 665), "ultimate fact" (*Dobson* v. *Com'r,* 320 U. S. 489, 501), "ultimate conclusion" or "inference of fact" (*N. L. R. B.* v. *Hearst Publications,* 322 U. S. 11, 130), "factual inferences and conclusions" (*Com'r* v. *Scottish American Inv. Co.,* 323 U. S. 119, 124). More recent pronouncements use the formula of "warrant in the record and a reasonable basis in law" (*N. L. R. B.* v. *Hearst Publications, supra,* at 131) or require that there be a "rational basis" for the administrative conclusion (*Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 146). The *Dobson* and *Scottish American* cases indicate that the admin-

istrative decision, whether called "factual inferences and conclusions," "ultimate fact" or "mixed," is not to be treated as one of law unless the elements of a decision can be so separated "as to identify a clear-cut mistake of law," *Dobson* case, 320 U. S. at 502.

The present question of administrative discretion in the field of coverage does not differ materially from that in the *Walker* and *Warren* cases where the issue related to employee status after entitlement. Coverage in those cases had an adverse effect on the individual's right to benefits. In both cases the district courts found for claimants on restrictive interpretations of the Act imposed on the Board as matters of law. In both instances the district courts had to be reversed. The issue in *Gray* v. *Powell,* 314 U. S. 402 was whether, on undisputed facts, the Director of the Bituminous Coal Division correctly concluded that a railroad was a "producer" within the meaning of the Bituminous Coal Act; in *Shields* v. *Utah-Idaho R. R. Co.,* 305 U. S. 177, whether a railroad was an "interurban" within the meaning of the Railway Labor Act; in the *Rochester Telephone* case whether one company was under the "control" of another within the meaning of the Communications Act; and in *South Chicago Coal & Dock Co.* v. *Bassett,* 309 U. S. 251, whether a claimant was a "member of a crew" within the meaning of the Longshoremen and Harbor Workers Compensation Act.

The establishment by Congress of an administrative authority with power to determine a particular question manifests an intention to rely on the expert judg-

ment of a body "informed by experience." *N. L. R. B.* v. *Hearst Publications,* 322 U. S. 111, 130; *Illinois Central R. R. Co.* v. *Interstate Commerce Commission,* 206 U. S. 441, 454; *N. L. R. B.* v. *Hoffman & Sons,* 147 F. (2) 679 (C. C. A. 3). Even if it were an available alternative a court is not warranted in imposing on the Social Security Board the construction of employment it favors. See *United States* v. *American Trucking Ass'n,* 310 U. S. 534, 545, fn. 29. The Board in dealing daily with the old-age and survivors insurance system and processing upwards of 2,000,000 claims (See Blachly and Oatman, *Judicial Review of Benefactory Action,* 33 Geo. L. J. 1, 12, fn. 53) has developed a familiarity with the background and objectives of the Act, which cannot well be attained by a court in a single contact with a segment of a problem arising under the Social Security Act, in most instances under appealing circumstances inimical to the formulation of a workable general rule.[20] An integrated national program may be thrown out of gear by a court desirous of liberalizing but inevitably lacking the flexibility, power, and resources to recast the regulations so as to achieve a stable nation-wide equilibrium in a complicated field. Cf. *Rottenberg* v. *United States,* 137 F. (2) 850, 856 (C. C. A. 1) affirmed sub. nom. *Yakus* v. *United States,* 321 U. S. 414; *Henderson* v. *Kimmel,* 47 F. Supp. 635, 645 (D. Kan.).

[20] The finality accorded the findings of the Board by Section 205 (g) is meaningless if a court may produce a "desirable" result in the light of a particular record, at the risk of disrupting coordinated administration of the tax and benefit provisions of the Old-Age and Survivors Insurance program as a contributory system.

Decisions of the character involved herein go to the heart of the Social Security Act. Affecting the minute details of administration, they belong uniquely to the expert tribunal established in the specialized field. There having been a fair hearing before the Board, an opportunity for plaintiff to present her contentions to the administrative tribunal, application of the Act in a just and reasoned manner, and a rational basis in the evidence to support the Board's conclusion, the court below exceeded its authority in reversing the judgment of the Board in the field entrusted to it by Congress. *Rochester Tel. Corp.* v. *United States,* 307 U. S. 125, 146; *Gray* v. *Powell,* 314 U. S. 402; *Dobson* v. *Com'r,* 320 U. S. 489; *Walker* v. *Altmeyer,* 137 F. (2) 531 (C. C. A. 2); *Social Security Board* v. *Warren,* 142 F. (2) 974 (C. C. A. 8).

CONCLUSION

The judgment appealed from clearly exceeded the proper scope of judicial review, is erroneous, and should be reversed with instructions to the district court to enter judgment affirming the decision of the Social Security Board.

Respectfully submitted.

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APPENDIX

Statutes and regulations involved

Title II, Section 202 (c) (1) of the Social Security Act (42 U. S. C. 402 (c) (1)) reads as follows:

Child's insurance benefits

> (c) (1) Every child * * * of an individual who died a fully or currently insured individual (as defined in section 209 (g) and (h)) after December 31, 1939 * * * shall be entitled to receive a child's insurance benefit for each month * * *

Title II, Sections 209 (g) and (h) of the Social Security Act as amended (42 U. S. C. 409 (g), (h)) provide in pertinent part as follows:

> (g) The term "fully insured individual" means any individual with respect to whom it appears to the satisfaction of the Board that
>
> (1) He had not less than one quarter of coverage for each two of the quarters elapsing after 1936, * * * and up to but excluding the quarter in which he * * * died * * *.
>
> As used in this subsection, and in subsection (h) of this section, the term "quarter" and the term "calendar quarter" mean a period of three calendar months ending on March 31, June 30, September 30, or December 31; and the term "quarter of coverage" means a calendar quarter in which the individual has been paid not less than $50 in wages. When the number of quarters specified in paragraph (1) of this subsection is an odd number, for purposes of such paragraph such number shall be reduced by one * * *

(h) The term "currently insured individual" means any individual with respect to whom it appears to the satisfaction of the Board that he has been paid wages of not less than $50 for each of not less than six of the twelve calendar quarters, immediately preceding the quarter in which he died.

Title II, Sections 209 (a) and (b) of the Social Security Act as amended (42 U. S. C. 409 (a) and (b)) read in pertinent part as follows:

Definitions

When used in sections 201–209 of this chapter—

(a) The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; * * *

(b) The term "employment" means any service performed after December 31, 1936, and prior to January 1, 1940, which was employment as defined in section 210 (b) of this chapter prior to January 1, 1940 (except service performed by an individual after he attained the age of sixty-five if performed prior to January 1, 1939), and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, irrespective of the citizenship or residence of either * * *

Employment had been defined in Section 210 (b) of the Social Security Act of August 14, 1935 (49 Stat. 620, 625) as follows:

(b) The term "employment" means any service, of whatever nature, performed by an employee for his employer * * *

Title II, Section 205 (g) of the Social Security Act as amended (42 U. S. C. 405 (g)) reads as follows:

Any individual, after any final decision of the Board made after a hearing to which he was a party, irrespective of the amount in controversy, may obtain a review of such decision by a civil action commenced within sixty days after the mailing to him of notice of such decision or within such further time as the Board may allow. Such action shall be brought in the district court of the United States for the judicial district in which the plaintiff resides, or has his principal place of business, or, if he does not reside or have his principal place of business within any such judicial district, in the District Court of the United States for the District of Columbia. As part of its answer the Board shall file a certified copy of the transcript of the record including the evidence upon which the findings and decision complained of are based. The court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying, or reversing the decision of the Board, with or without remanding the cause for a rehearing. The findings of the Board as to any fact, if supported by substantial evidence, shall be conclusive, and where a claim has been denied by the Board or a decision is rendered under subsection (b) hereof which is adverse to an individual who was a party to the hearing before the Board, because of failure of the claimant or such individual to submit proof in conformity with any regulation prescribed under subsection (a) hereof, the court shall review only the question of conformity with such regulations, and the validity of such regulations. The court shall, on motion of the Board, made before it files its answer, remand the case to the Board for further action by the Board, and may, at any time, on good cause shown, order additional evidence to be taken before the Board, and the Board shall, after the case is remanded, and after hearing such additional evidence if so ordered, modify

> or affirm its findings of fact or its decision, or both, and shall file with the court any such additional and modified findings of fact and decision, and a transcript of the additional record and testimony upon which its action in modifying or affirming was based. Such additional or modified findings of fact and decision shall be reviewable only to the extent provided for review of the original findings of fact and decision. The judgment of the court shall be final except that it shall be subject to review in the same manner as a judgment in other civil actions.

Title II, Section 205 (h) of the Social Security Act as amended (42 U. S. C. 4505 (h)) reads as follows:

> (h) The findings and decision of the Board after a hearing shall be binding upon all individuals who were parties to such hearing. No findings of fact or decision of the Board shall be reviewed by any person, tribunal, or governmental agency except as herein provided. No action against the United States, the Board, or any officer or employee thereof shall be brought under section 24 of the Judicial Code of the United States to recover on any claim arising under this title.

Section 403.804 of Social Security Board Regulations No. 3 [21] (Part 403, Title 20, Code of Federal Regulations, 1940 Supp.) provides:

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[21] Controlling with respect to services after December 31, 1939. The Board's Regulations No. 2 (Part 402, Title 20, Code of Federal Regulations, Section 402.3) control with respect to services until December, 1939. They contain substantially the same provisions. The first sentence reads: "The relationship between the person for whom services are performed and the individual who performs such services must as to those services be the legal relationship of employer and employee."

Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

Generally such relationship exists when the person for whom services are performed has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work to the individual who performs the services. In general, if an individual is subject to the control or direction of another merely as to the result to be accomplished by the work and not as to the means and methods for accomplishing the result, he is an independent contractor. An individual performing services as an independent contractor is not as to such services an employee.

Generally, physicians, lawyers, dentists, veterinarians, contractors, subcontractors, public stenographers, auctioneers, and others who follow an independent trade, business, or profession, in which they offer their services to the public, are independent contractors and not employees.

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

> If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.
>
> The measurement, method, or designation of compensation is also immaterial, if the relationship of employer and employee in fact exists.
>
> No distinction is made between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees. An officer of a corporation is an employee of the corporation, but a director as such is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

Treasury Regulations 91, Article 3, applicable to Title VIII of the Social Security Act (Part 401, Title 20, Code of Federal Regulations, Section 401.3); Treasury Regulations 90, Article 205, applicable to Title IX of the Social Security Act (Part 400, Title 20, Code of Federal Regulations Section 400.205); Treasury Regulations 106, Section 402.204, applicable to chapter 9A of the Internal Revenue Code, Federal Insurance Contributions Act (Part 402, Title 26, Code of Federal Regulations, 1940 Supp.); and Treasury Regulations 107, Section 403.204, applicable to chapter 9C of the Internal Revenue Code, Federal Unemployment Tax Act (Part 403, Title 26, Code of Federal Regulations, 1940 Supp.) define "employees" in substantially the same terms as the corresponding sections of Social Security Board Regulations 2 and 3.

U. S. GOVERNMENT PRINTING OFFICE: 1945

No. 10,998

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA and THE SOCIAL SECURITY BOARD OF THE UNITED STATES OF AMERICA,

Appellants,

vs.

AUGUSTA J. LALONE, on behalf of JULIE S. LALONE, JANET D. LALONE, JILL R. LALONE and LANCE D. LALONE,

Appellee.

BRIEF OF APPELLEE

Upon Appeal From the District Court of the United States for the Eastern District of Washington, Northern Division.

JUSTIN C. MALONEY,

Attorney for Appellee.

INLAND-AMERICAN PTG. CO.

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FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA and THE SOCIAL SECURITY BOARD OF THE UNITED STATES OF AMERICA, *Appellants,* vs. AUGUSTA J. LALONE, on behalf of JULIE S. LALONE, JANET D. LALONE, JILL R. LALONE and LANCE D. LALONE, *Appellee.*	No. 10998

BRIEF OF APPELLEE

Upon Appeal From the District Court of the United States for the Eastern District of Washington, Northern Division.

STATEMENT AS TO JURISDICTION

Appellee instituted this action in the District Court of the United States for the Eastern District of Washington, Northern Division, being a resident of such judicial district, seeking review of the final decision of The Social Security Board of the United States denying the application of appellee for child's insurance benefits for four of her minor children

pursuant to jurisdiction conferred by Section 205 (g) of the Social Security Act.

STATEMENT OF THE CASE

Appellee controverts the statement of the case made by appellants in their brief as wholly inadequate and incomplete. December 7, 1942, appellee duly filed application under Title 11 of the Social Security Act as amended (53 Stat. 1362, 42 U.S.C.A., Sections 401 et seq.) for child's insurance benefits (Section 202 (c) of the Act as amended, 42 U.S.C.A. Section 402 (c) for four of her infant children, based upon the alleged status of her husband, Dwight J. LaLone, as an insured individual under the Act. (Tr. 78)[1]. February 19, 1943, the Bureau of Old Age and Survivors Insurance of the Social Security Board denied the application (Tr. 115), and thereafter upon reconsideration affirmed its decision. (Tr. 113). Hearing of the application before a Referee of the Social Security Board was requested and granted. The Referee denied the application and held that the wage earner was not a fully or currently insured individual for the reason that he was not an employee within the contemplation of the statute for a sufficient period prior to his death (Tr. 8 to 13).

Thereupon appellee appealed to the Appeals Council of the Social Security Board. March 11, 1944, the Appeals Council affirmed the Referee and adopted his

1. References to the printed record will be abbreviated R. . . . References to the photoprint transcript of the administrative proceedings will be abbreviated Td. . . . References to specific pages of the transcript will be to the handwritten numbers appearing near the top of the outside margin.

findings of fact and statement of reasons (Tr. 2). Under the practice of the Social Security Board this became the final decision of the Board. Appellee then brought this action to review the denial of her claims on behalf of her children, pursuant to the jurisdiction conferred by Section 205 (g) of the Social Security Act (R. 2).

Appellee is the widow of Dwight J. LaLone who died November 20, 1942. He left surviving him besides appellee, five minor children and a sixth child who was born some time later. The application here under review is in behalf of the four children named in the caption of this proceeding.

F. S. Barrett and his son, F. S. Barrett Jr., had been engaged in the general real estate business in Spokane for many years prior to the periods here in question (Tr. 35). While a young man Dwight J. LaLone worked for them as an insurance salesman (Tr. 37). That employment terminated when he obtained employment as manager of the insurance department for a local bank. When that bank failed Mr. LaLone purchased the insurance business of the bank and from that time until August 1, 1938, decedent conducted said insurance business under the name of D. J. LaLone Insurance Agency (Tr. 38).

By 1938, his business had reached the point where he owed substantial sums of money to the companies he represented for commissions he had collected (Tr. 27). He faced serious consequences unless such could be paid. Final demands for payment of these sums

aggregating more than Two Thousand ($2,000.00) had been made upon him (Tr. 32). This was the situation confronting LaLone in 1938. He then went back to his old employers, the Barretts. They were willing to assist their former employee (Tr. 37). They advanced the necessary funds with which he could make up his delinquencies (Tr. 40). They took his notes for such amounts, totaling the sum of $2,039.63 (Tr. 120 to 123). At that time, August 1, 1938, LaLone went to work for the Barretts for $200.00 a month (Tr. 28, 34). The LaLone Insurance Agency was then moved to the office of the Barretts. LaLone was employed as manager of the combined agencies. The promissory notes signed by LaLone in favor of F. S. Barrett & Co. were all due and payable one year from their respective dates (Tr. 120 to 123). No payment of principal or interest was made on any of the notes until May 1, 1942 (Tr. 49). LaLone's compensation of $200.00 a month continued from August, 1938, to May 1, 1942 (Tr. 34). During this period of three years and nine months the Barretts furnished the place at which the business was transacted. LaLone adjusted his working hours to comply with the office hours of the Barretts (Tr. 49, 66). The Barretts decided on the important questions of policy and had the right to decide on all questions of policy (Tr. 49, 53, 56). In matters of office management the policy of the corporation prevailed (Tr. 50, 76, 77). The Barretts considered LaLone as their employee. The matter of ultimate control of the insurance department was with the Barretts (Tr. 53).

F. S. Barrett Jr., was the secretary-treasurer of the corporation, the arrangement between the corporation and LaLone was made with F. S. Barrett Jr., acting on behalf of the corporation (Tr. 34). Barrett Jr. employed the stenographer in the insurance department, the only other employee besides LaLone (Tr. 42).

In January, 1942, LaLone registered as an employee with the Social Security Board and received his Social Security Account Number (Tr. 69, 70). At the same time Miss Dorothy Ebeling, stenographer in the insurance department, also registered and received her Account Number. Thereafter returns were duly filed under the Act showing both employees and the wages paid them. Barrett Jr. had requested from time to time that such registrations be made and the returns filed (Tr. 70, 76). Barrett Jr. knew that only salaries paid to employees should be reported and taxed, and with that knowledge, coupled with his knowledge of the relation between his company and LaLone, directed that LaLone register as an employee and that the tax thereon be paid (Tr. 76, 77). LaLone personally registered as an employee.

A memorandum of agreement was prepared by counsel for Barrett Company but was never executed by either of the parties thereto (Tr. 53). The copy of the memorandum introduced in evidence was uncovered in the Barrett office while some furniture was being moved, shortly prior to the hearing before the Referee (Tr. 39).

On some occasions there was not sufficient money on hand in the agency to pay salaries and expenses as they became due, and on such occasions money was either advanced by the corporation to the agency or borrowed by the agency from the bank (Tr. 51). The agencies were kept separate during the entire time for business reasons; that is, the policies written in the LaLone agency were endorsed "D. J. LaLone Insurance Agency," and the policies written in the Barrett agency were endorsed with the Barrett name (Tr. 43, 54, 66). The bank account was carried in the name of Barrett-LaLone Insurance Agency (Tr. 40). The arrangement between the parties provided for the breaking up of the business just as it had been put together. If it didn't prove satisfactory on either part, LaLone could pay the Barretts back their money and take his business (Tr. 48, 57, 59). LaLone had the right to buy back his business (Tr. 55). The relation between the Barretts and LaLone remained the same from August 1, 1938, to May 1, 1942, when the relationship was terminated (Tr. 29).

QUESTIONS INVOLVED

1. Was Mr. LaLone engaged in employment covered by the Social Security Act from August 1, 1938, to May 1, 1942.

Answered by the trial Court in the affirmative.

2. Was the determination by the Social Security Board that Mr. LaLone was not engaged in employment covered by the Social Security Act from August 1, 1938, to May 1, 1942, warranted by the record in this case, and did such determination have reasonable basis in the law.

Answered by the trial Court in the negative.

First, in order to clarify the issue in this case, no question is raised in this proceeding about the determination of other proceedings by the Social Security Board. Second, the straw-man argument urged by appellants that self-employed people, employers and entrepreneurs are not covered by the Social Security Act, is admitted. Third, let us not beg the question with the assumption that LaLone was a self-employed person during the period in question and then proceed vigorously to demonstrate that self-employed people are not covered by the Act.

Appellants apparently admit that the administrative determination in this matter was erroneous, for on Page 14 of their brief they say, "Was the administrative determination on the undisputed facts that LaLone was self-employed and not in the employ of another *so erroneous* as to permit the District Court

to say that as a matter of law it was not supported by substantial evidence." The matter presented to the Board was simple, clear-cut and not involved—was LaLone in covered employment between the dates stated above. The Board's determination of that matter was either right or wrong; there is no in between zone.

The definitions of "wages" and "employment" as set forth in the Act seem to be as broad and inclusive as carefully selected language could provide. Section 209 (a) of the Social Security Act as amended (Title 42, U.S.C., Section 409 [a]), provides that "The term 'wages' means all remuneration for employment . . . " Section 209 (b) of the Social Security Act as amended (Title 42, U.S.C., Section 409 [b]), defines employment as "any service performed after December 31, 1936, and prior to January 1, 1940, which was employment as defined in Section 210 (b) of the Social Security Act prior to January 1, 1940 . . . " and with exceptions not here pertinent, "any service of whatever nature, performed after December 31, 1939, by an employee for the person employing him . . . " Section 210 (b) of the Social Security Act in effect prior to January 1, 1940, (49 Stat. 625), defines "employment" to mean, with exceptions not here pertinent, "any service of whatever nature performed within the United States by an employee for his employer."

What does the record disclose as to the relation or agreement between the Barretts and LaLone. In determining whether that relation constituted LaLone

an employer, a partner, a joint venturer or an employee, we must consider the situation of the parties at the time the relationship was created. LaLone was defunct; he was in a perilous situation; the companies for whom he wrote insurance had not been paid the portions of the premiums due them on their insuring contracts then outstanding; over $2,000.00 was due these companies; final demands for payment had been made upon LaLone; his agency was on the precipice, yes, but more—he was not indebted on a pure contractual obligation — his indebtednesses represented monies belonging to those companies when they were first collected by him. The trial Court in his written opinion herein accurately stated the position of LaLone:

> "In his decision, the referee stresses the value of LaLone's insurance assets. To the uninitiated, such insurance accounts might seem valuable. With commendable modesty the referee admitted his unfamiliarity with the insurance business. The fact is that there is nothing less valuable than the insurance accounts of an agent who becomes delinquent with the companies he represents. He not only loses the right of representation of those particular companies, but he loses the opportunity of representation of any other companies. What he has is worthless. This was the situation confronting LaLone in 1938." (R. 29).

Clearly, LaLone at that time was not entirely a free agent. On the other hand, the Barretts were entirely free in the matter. Their former employee had left them under friendly circumstances, they were willing to assist their former employee and they advanced

the necessary funds with which he could make up his delinquencies and they took his notes for such amounts, as the trial Court found:

> "It is true that he (LaLone) hoped, as did the Barretts, that an insurance partnership later could be evolved. What he had at the time and during the entire time he was working there was simply a provisional arrangement whereby he could become a partner upon the success of the enterprise." (R. 30).

As Mr. Barrett Jr. testified:

> "Oh, no, no, because our understanding provided for the breaking up of our business just as it had been put together. If it didn't prove satisfactory on either part he could pay us our money back and take his business." (Tr. 57).

And again:

> "Well, our understanding was that he could buy his business—was separate to the extent that he could buy back the notes and take his business." (Tr. 59).

Appellants in their brief on Pages 29 and 30 thereof, state that "Both parties considered they were to share in losses as appears from the fact that LaLone, as well as one of the Barretts, signed the notes every time money was borrowed by the Barrett-LaLone Insurance Agency." Their unwarranted conclusion is best answered by referring to the transcript on Page 103 thereof we find the following questions propounded to Mr. Barrett Sr., and his answers thereto:

> "23. a. What provisions were there in the partnership agreement for the sharing of losses?
>
> None.

> b. If there was no such provision, what was the parties' understanding as to the allocation of such losses?
>
> F. S. Barrett & Co. would have been responsible and would have terminated his employment and kept the business."

Clearly, the finding of the Court that "LaLone had no financial responsibility. If the arrangement had resulted in debt, the Barretts would have paid the debt and discharged him" (R. 31, 32) is wholly warranted by the record herein and is typical of the misleading arguments of appellants herein, and is typical of the way the Referee ignored the record herein.

Three people were involved: F. S. Barrett Sr., F. S. Barrett Jr., and D. J. LaLone. All three have unequivocally indicated by either word or act that the relationship created was one of employment.

Page 107 of transcript, F. S. Barrett stated to Mr. Paul F. Johnson, assistant manager of Social Security Board office at Spokane, Washington, that:

> "He (F. S. Barrett Sr.) stated that he had always considered Mr. LaLone as his employee; however, he could offer no explanation as to why he had not included Mr. LaLone on their tax returns."

F. S. Barrett Jr. testified that he considered Mr. LaLone as their employee (Tr. 76, 77). Further, it was at his suggestion and direction that Mr. LaLone register as an employee. Mr. LaLone certainly considered himself an employee, for he registered under the Social Security Act as an employee. Thus we see all of the people involved in this matter considered

the relation one of employment. What stronger showing of employment could be made than presenting acts and statements of both employer and employee that the relationship was that of employment? Could the trial Court have done else but find that the decision of the Referee was not warranted by the record?

On pages of the transcript 93, 95 and 99, F. S. Barrett filed Statement of Employer covering the years 1938, 1939, 1940, 1941 and 1942, wherein he stated, "This is to certify that there has been paid to Dwight Julian LaLone 539-16-1206 for employment (as defined by the Social Security Act as amended) with the undersigned employer, wages in the amounts indicated during the quarters shown below:" (Then follows statement of wages paid). These were all signed by Mr. Barrett Sr., January 15, 1943. Again on January 27, 1943, Mr. Barrett Sr. stated the arrangement had with LaLone in the following words:

> "Oral understanding that F. S. Barrett & Co. loan to Dwight LaLone, sufficient money to pay overdue premiums to his companies, he to give his business as security, moving into F. S. Barrett & Co.'s office and managing both his and Barrett's insurance business, on a salary of $200.00 per month until he paid his notes. At that time a new basis was to be agreed upon or he could take agency of his companies out of F. S. Barrett & Co.'s office. A bank account was opened up as Barrett-LaLone Insurance Agency, otherwise the business was maintained under two separate heads, notes were paid and he moved out May 1, 1942." (Tr. 104).

In view of the foregoing, it is fair to ask: Why were all funds deposited to the account of Barrett-

LaLone Insurance Agency? Why were all notes signed by one of the Barretts and LaLone? Why were all checks signed by one of the Barretts and LaLone? And the answers are certainly obvious: Not because LaLone had any proprietary interest or present ownership therein, but solely for the protection of the Barretts. What less could have been done by the Barretts to protect their agency from the condition in which LaLone then found himself?

Appellants on Pages 35 and 36 of their brief, contend that LaLone did not receive a salary of $200.00 a month as found by the trial Court, and conclude on Page 36, "That salary was merely a working partner's or coadventurer's allowance or drawings . . . " Again we find the answer clear and direct in the record:

> "30. a. Did the employee receive a salary for the services he performed in addition to his drawing account, if any?
>
> No drawing account permitted. $200.00 monthly salary only.
>
> b. Was he allowed a drawing account?
>
> No." (Tr. 103).

Appellants laboriously attempt to show on Page 37 of their brief that the Barretts could not terminate the relationship. Never has an unexecuted, disregarded and forgotten instrument been accorded more weight than in the decision of the Referee in this proceeding and in the brief of appellants herein. Nothing could be more definite than the statement of F. S. Barrett Sr. that in event of loss, F. S. Barrett & Co. would

have been responsible and would have terminated his employment and kept the business.

Truly, the record bulges with proof that LaLone was an employee from August 1, 1938, to May 1, 1942, and only by the most tortuous interpretation of the statute and regulations and disregard of the record herein, could it be concluded that LaLone was not engaged in employment covered by the Act. The finding and decision of the Referee clearly does not have warrant in the record.

Appellants argue "Findings of the Board supported by substantial evidence are conclusive."

The applicable statute provides in part as follows:

> "Any individual . . . may obtain a review of such decision by a civil action commenced within sixty days . . . Such action shall be brought in the District Court of the United States for the judicial district in which the plaintiff resides . . . The Court shall have power to enter, upon the pleadings and transcript of the record, a judgment affirming, modifying or reversing the decision of the Board, with or without remanding the cause for a rehearing. The findings of the Board as to any fact, if supported by substantial evidence, shall be conclusive, . . . "
>
> Title 11, Section 205 (g) of the Social Security Act as amended (42 U.S.C.A. 405 [g]).

Obviously, this statute does not require of the Court an idle act, but substantially provides for review as therein provided. The wording of the statute itself answers the argument of appellants when it says, "if supported by substantial evidence." If we follow the reasoning of appellants, we come to this

situation: Any determination by administrative board is final and conclusive if a hearing has been accorded and there is a scintilla of evidence to sustain the decision. The directives of the statute are plain; the findings of the Board as to any fact, ultimate or intermediate, are only conclusive if supported by substantial evidence. In order for the Court to accord the review provided by the statute, the Court must examine the evidence to see if there is substantial evidence to support the Board's findings.

A similar question was presented to the District Court of Pennsylvania, and the Court there held:

> "Counsel for the Board contend that there is substantial evidence to support the Board's finding that Morgan was 'neither actually nor constructively paid wages in the period from January 1, 1937, to April 9, 1938,' and that, consequently, this Court cannot consider this question in this proceeding. Were this merely a finding of fact, we would agree with this reasoning. 42 U.S.C.A. Par. 405 (g). However, this finding represents a determination by the Board that the facts do not constitute payment of wages within the meaning of the Social Security Act as a matter of law. As such it is subject to review by this Court."
>
> *Morgan v. Social Security Board*
> 45 Fed. Supp. 349, 352.

The trial Court has found that the Referee reached his conclusion without regard to the statute or regulations and that his determination has no reasonable basis in law, and that his factual analysis has no warrant in the records. The Supreme Court of the United States has passed upon this question:

> "It is contended that the applicable statutes and regulations properly interpreted, forbid the method of calculation followed by the Tax Court. If this were true, the Tax Court's decision would not be 'in accordance with law' and the Court would be empowered to modify or reverse it. Whether it is true is a clear-cut question of law and is for decision by the Courts."
>
> *Dobson v. Commissioner of Internal Revenue* 320 U. S. 489, 492, 493.

In *Gray v. Powell,* 314 U. S. 402, relied upon by appellants herein, the Supreme Court in its decision showed that the administrative decision was made in accordance with law and did have warrant in the record, and the reversal of the Circuit Court was on the merits as shown by the record, that the finding of the Commission that the railroad was a "producer" within the meaning of the Bituminous Coal Act, did have warrant in the record and was in accordance with law.

Walker v. Altmeyer, 137 F. (2) 531 (C. C. A. 2), cited by appellants, is further proof of the point that the decision of the administrative Board must be in accordance with law and supported by substantial evidence. There the Court thoroughly justified the administrative decision and showed that Walker was engaged in employment and was receiving compensation in excess of $15.00 a month, and therefore not entitled to primary benefits under the Act. Stated conversely, the ruling of the Court was simply that the conclusion of the trial Court was not supported by the evidence in the case.

A similar question was presented to the Circuit Court of Appeals, Seventh Circuit in *Carroll v. Social Security Board,* 128 F. (2) 876, and that Court on Page 881, said:

> "The purpose which Congress had in mind, and the object sought to be accomplished by the enactment before us, is aptly stated in *Helvering v. Davis,* 301 U. S. 619, 640, 672; 57 S. Ct. 904; 81 L. Ed., 1307; 109 A.L.R., 1319, et seq. That it should be liberally construed in favor of those seeking its benefits cannot be doubted. While the question before us is not free from doubt—in fact, it is extremely close—we are of the opinion that plaintiff was an employee of the bank within the meaning of the Act and entitled to its benefits. In so concluding we have not overlooked the statutory admonition which binds us to accept the finding of the Social Security Board if supported by substantial evidence. The rule is not controlling, however, because the Board's decision, that plaintiff was not an employee within the terms of the Act, is without substantial support. Moreover, in our view, the rule has no application because the question presents an issue of law rather than of fact. It involves a construction of the Act."
>
> *Carroll v. Social Security Board*
> 128 F. (2) 876, 881.

In every case the reviewing Court has examined the evidence and determined whether or not the administrative decision has warrant in the record and is supported by substantial evidence. The trial Court in this case did just that thing and found that the administrative decision did not have warrant in the record and was not supported by substantial evidence and was contrary to law. Appellants apparently seek a

rule requiring the Courts to blindly accept the administrative determination. Such is not the law.

The Referee's decision in this matter and statement of reasons therefor adopted by the Social Security Board as its decision not containing any findings of fact, but being as the trial Court has stated, "a confused mixture of findings, inferences and conclusions," certainly cannot nullify the judicial review provided by statute. *United States v. Carolina Freight Carriers Corp.,* 315 U. S. 475, 488, 489; *Florida v. United States,* 282 U. S. 194, 215.

Appellants disclaim all intent to narrowly construe the Act or to be dominated by restrictive common law tests in determining coverage, but the decision of the Referee on the record herein speaks more positively to the contrary.

The Circuit Court of Appeals for the Sixth Circuit had before it a comparable question and said:

> "It will avail us little to consider whether the master-servant relationship existed between the appellee and its home workers under the common law, and we may assume that the well-considered opinion of the District Judge was, in that respect, sound, even though there are cases, both state and federal, which hold that an employer-employee status may exist when there is no continuous supervision over the work if there is such supervision as the nature of the work requires . . . We are dealing, however, with a specific statute which, like the National Labor Relation's Act, 29 U.S.C.A. Sec. 151 et seq., is of a class of regulatory statutes designed to implement a public, social, or economic policy through remedies not only unknown to the common law but often in

derogation of it . . . If the Act presently considered, expressly or by necessary implication, brings within the scope of its remedial and regulatory provisions, workers in the status here involved, we are not concerned with the question whether a master-servant relationship exists under otherwise applicable rules of the common law."

Walling v. American Needlecrafts Inc.,
139 F. (2) 60, 63.

In *United States v. Vogue Inc.,* Judge Parker, speaking for the Court said:

" . . . To allow the employer to escape the consequences or to deny the employee the benefits of the employer-employee relationship because of agreement that payment be made on the piece work basis or because the employee exercises the judgment with respect to the work that is expected of any skilled worker, is to lose the substance of the relationship in attempting to apply certain rule of thumb distinctions in the law of independent contractors. The fact that one having an independent calling, such as a cook, gardener, or chauffeur, exercises a judgment as to the work done free of detailed direction by his employer does not make him an independent contractor . . . "

And again Judge Parker says:

"The Social Security Act, like the Fair Labor Standards Act, . . . , and the National Labor Relations Act, . . . , was enacted pursuant to a public policy unknown to the common law; and its applicability is to be judged rather from the purposes that Congress had in mind than from common law rules worked out for determining tort liability . . . "

United States v. Vogue Inc.
145 F. (2) 609, 610, 611.

In *National Labor Relations Board v. Hearst Publications Inc.,* 322 U. S. 111, the Court discussed the questions here presented and stated the guiding rules which are determinative of this proceeding:

At Page 124 the Court said:

> "Whether, given the intended national uniformity, the term 'employee' includes such workers as these newsboys must be answered primarily from the history, terms and purposes of the legislation. The word 'is not treated by Congress as a word of art having a definite meaning . . . ' Rather 'it takes color from its surroundings . . . (in) the statute where it appears,' . . . and derives meaning from the context of that statute, which 'must be read in the light of the mischief to be corrected and the end to be attained,' . . . "

and on Page 126,

> "The mischief at which the Act is aimed and the remedies it offers are not confined exclusively to 'employees' within the traditional legal distinctions separating them from 'independent contractors.' Myriad forms of service relationship, with infinite and subtle variations in the terms of employment, blanket the nation's economy. Some are within this Act, others beyond its coverage. Large numbers will fall clearly on one side or on the other, by whatever test may be applied. But intermediate there will be many, the incidents of whose employment partake in part of the one group, in part of the other, in varying proportions of weight. And consequently the legal pendulum, for purposes of applying the statute, may swing one way or the other, depending upon the weight of this balance and its relation to the special purpose at hand."

The Court on Page 128 deals with the economic situation particularly pertinent to this case:

> "In short, when the particular situation of employment combines these characteristics, so that the economic facts of the relation make it more nearly one of employment than of independent business enterprise with respect to the ends sought to be accomplished by the legislation, those characteristics may outweigh technical legal classification for purposes unrelated to the statute's objectives and bring the relation within its protections."

continuing on Page 129 with further reference to the economic situation:

> "In this light, the broad language of the Act's definitions which in terms reject conventional limitations on such conceptions as 'employee,' 'employer,' and 'labor dispute' leaves no doubt that its applicability is to be determined broadly, in doubtful situations, by underlying economic facts rather than technically and exclusively by previously established legal classifications . . . "

and the Court on Page 132 of the opinion after statement of the record states that "The record sustains the Board's findings and there is ample basis in the law for its conclusion.

CONCLUSION

The Trial Court correctly found that D. L. LaLone was in covered employment under the Act during the time here involved and the finding of the Social Security Board to the contrary was not sustained by substantial evidence and was not warranted by the record and not in accordance with law. The judgment of the trial Court is correct and should be affirmed.

Respectfully submitted,

JUSTIN C. MALONEY,
Attorney for Appellee.

No. 10998

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA AND SOCIAL SECURITY BOARD, APPELLANTS

v.

AUGUSTA J. LALONE, ON BEHALF OF JULIE S. LALONE, JANET D. LALONE, JILL R. LALONE, AND LANCE D. LALONE, APPELLEES

ON APPEAL FROM THE JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE EASTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

REPLY BRIEF FOR APPELLANTS

EDWARD M. CONNELLY,
United States Attorney,

ARNOLD LEVY,
Special Assistant to the Attorney General,

HUBERT H. MARGOLIES,
Attorney, Department of Justice,
Attorneys for Appellants.

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AUTHORITIES CITED

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PRELIMINARY STATEMENT

This reply brief is submitted, pursuant to stipulation herein, primarily for the purpose of repelling the attacks on appellants' statement of the case and renewed attacks on the referee's findings. For a more complete statement of the facts, reference is made to appellants' main brief and the referee's decision herein (Tr. 8–13).

THE FACTS

It is plain from the record that LaLone possessed a valuable asset in his insurance business and that the Barretts were actuated by business motives rather than sentiment in associating themselves with him. Even the testimony of Mrs. LaLone (Tr. 27, 32) does not bear out appellees' statement that final demands from the insurance companies had been received and that LaLone's condition was desperate. In fact, his valuable insurance business was quite attractive to the Barretts, who entered into an arms-length mutual benefit agreement with anticipation. At least the referee might have so found. The record is without support for the court's assertion (R. 29), quoted at page 9 of appellees' brief, that what LaLone had in 1938 was worthless, or appellees' assertion that LaLone's agency was on the precipice. Moreover, at the inception of the venture in 1938, according to Barrett, Jr.'s, testimony, it was considered that LaLone's insurance accounts were worth $3,600. He testified that F. S. Barrett & Co., by lending $2,148 (the actual amount was $2,039.63) to La-

Lone, put into the Barrett-LaLone Insurance Agency only a "little" more than the $1800 for which F. S. Barrett & Co., under the terms of the agreement, could buy a one-half interest in the Barrett-LaLone Insurance Agency after repayment of the notes, and that he, Barrett, therefore felt that their interest was "a little over half way" (Tr. 57–58). In May 1942, LaLone sold his insurance business to a third party for $5,000, paid off the notes, and dissolved the Barrett-LaLone Insurance Agency (Tr. 31–32, 47–48, 58, 129). Appellees are unable to reconcile the sale of his business in 1942 for $5,000 with its worthlessness in 1938. In view of the absence of any evidence to show a change in value and the failure to show profits between 1938 and 1942 (Tr. 49), if the insurance accounts were worth $5,000 in 1942, they were worth at least $3,600 in August 1938. Indeed, appellees' counsel stated at the hearing before the referee, and Barrett, Jr., agreed with him (Tr. 54), that the venture never proved as successful as the parties had hoped.

Appellees fail to explain the rental charged the Barrett-LaLone Insurance Agency by the Barrett Co. (Tr. 45, 51) and the maintenance of separate accounts (See Tr. 48 Barrett, Jr.—"We kept our records entirely separate with the idea that we could split if the agreement didn't prove out to be all right, and we pooled the money into one account and handled it all under the Barrett-LaLone Agency account."). And Mrs. LaLone testified (Tr. 27)—"I don't know whether they ever came to an agreement or not. But he was to manage Mr. Barrett's insurance agency in connection with his own."

The failure to file social security tax returns until 1942, as well as the fact that money was never borrowed for the "benefit of the insurance company" without LaLone's signature (Tr. 52) also require explanation if the theory of an employment status with F. S. Barrett & Co. is to be accepted.

At page 5 and elsewhere in appellees' brief much is made of the evidence that in January, 1942, LaLone registered as an employee with the Social Security Board and received a Social Security Account Number, and that at the same time Miss Ebeling also registered and received her Account Number, and that thereafter "returns were duly filed under the Act showing both employees and the wages paid them," etc. Attention might have been drawn to Lalone's contemporaneous insistence that coverage under the Social Security Act, was not sought on the basis that he and Miss Ebeling were employees of the corporation, F. S. Barrett & Co., which had its own Employer's Identification Number distinct from that obtained by Barrett-LaLone Insurance Agency (Tr. 124), but on the contrary, on the basis they were employees of the latter. And it might well have been added that those returns (filed only for the first quarter of 1942, and for the second quarter up to May 15, 1942), alleged that LaLone and Miss Ebeling were employees of *Barrett-LaLone Insurance, not of F. S. Barrett & Co.* (Tr. 125–129). Likewise, it is highly selective to omit to mention that *LaLone,* in obtaining for Barrett-LaLone Insurance Agency a separate Employer's Identification Number, expressly informed the Bureau of Internal Revenue that *he and F. S. Barrett & Co. were co-owners of the Barrett-*

LaLone Insurance Agency (Tr. 124), and subsequently filed (attached to the tax return for the second quarter up to May 15, 1942), a *notice of dissolution of the partnership of the Barrett-LaLone Insurance Agency* (Tr. 129). Appellees neglect to refer to the highly significant testimony that the Social Security taxes in connection with the only two returns that were filed, were "paid out of the Barrett-LaLone Insurance Agency, not Barrett and Company" (Barrett, Sr., at Tr. 70). F. S. Barrett & Co. never reported either LaLone or Miss Ebeling as its employee. Even after the death of LaLone and the filing of the application for benefits, a statement was made out on January 14, 1943, in the course of the usual administrative inquiry, on Social Security Board Form OAC–1001, signed "Barrett-LaLone Ins. Agency, by F. S. Barrett," purporting to show wages paid LaLone *not by F. S. Barrett & Co., but by Barrett-LaLone Insurance Agency* as the alleged employer (Tr. 93, 95, 99). It becomes obvious that both the Barretts and LaLone, in their belated efforts to obtain coverage, were proceeding upon the legally untenable theory that a working member of a partnership or joint adventure, drawing a so-called "salary," is not only a partner or joint adventurer, but may also simultaneously be an employee of the partnership or joint adventure—in this case, the Barrett-LaLone Insurance Agency. See cases cited at page 22 of Appellants' brief, *e. g., Auten* v. *Michigan Unemployment Compensation Commission,* 17 N. W. (2d) 249, (1945), in which the Supreme Court of Michigan held, in accordance with the general rule, that "a working partner, receiving a stated salary," is

not an "employee." See also *Ellis* v. *Joseph Ellis & Co.*, (1905) 1 K. B. 324; "Working Partners," by Joel Brown, Chairman, Idaho Industrial Accident Board, Bulletin No. 432, Bureau of Labor Statistics, United States Department of Labor, 1926, pages 190–195.

The appellees' rhetorical questions (Brief, pp. 12–13), "Why were all funds deposited to the account of Barrett-LaLone Insurance Agency? Why were all notes signed by one of the Barretts and LaLone? Why were all checks signed by one of the Barretts and LaLone?", ignore the essentials of the situation. It was not merely that *LaLone's* powers were circumscribed. By the same token the Barretts could not sign checks on the Agency funds without the cosignature of LaLone (Tr. 40–42), nor sign notes of the Agency without the cosignature of LaLone (Tr. 51–52). It would be strange, indeed, for the signature of a mere employee to be requisite to the effectiveness of a check or note signed by the supposed sole owner of the business. Clearly, the requirement of countersignature by the representative of one member of the venture, the corporation, and by the other, LaLone, was important evidence of joint control and ownership.

At pages 10–11 of appellees' brief, the finding of the court below that, "LaLone had no financial responsibility. If the arrangement had resulted in debt, the Barretts would have paid the debt and discharged him" (R. 32) is adopted. LaLone put at the hazard of the business not only his accounts but also his personal liability on the notes to the bank, not to mention his liability on the notes to F. S. Barrett & Co., Inc. The

appellees, like the lower court, rely upon a statement in the Questionnaire to the effect that there was no provision for sharing of loss and that F. S. Barrett & Co. would have been responsible for losses. However, the statement is disproved by the evidence before the referee. In the first place, there are the promissory notes totalling $2,039.63, which LaLone executed to F. S. Barrett & Co. He would have remained liable if he had not discharged them. Then, too, there is the testimony regarding notes given for bank loans obtained by Barrett-LaLone Insurance Agency, which LaLone was required to sign along with one of the Barretts. Those notes were later repaid to the bank out of the subsequent profits of the agency (Tr. 51–52), but LaLone, as well as Barrett, would have been liable if losses had been suffered. Indeed, under the provisions in the unsigned agreement, which Barrett testified "clearly reflects the relationship that was intended" by Barrett and LaLone (Tr. 39), it was contemplated that LaLone would share in losses as well as in profits. Finally, as pointed out in footnote 19 at page 29 of appellants' brief, the absence of an express agreement to share losses is not inconsistent with a joint venture.

For the rest, appellees have misconceived the scope of judicial review and consequently have been persuaded (pp. 7–8 of their brief) that

> Appellants apparently admit that the administrative determination in this matter was erroneous, for on page 14 of their brief they say, "Was the administrative determination on the undisputed facts that LaLone was self-employed

> and not in the employ of another so *erroneous* as to permit the District Court to say that as a matter of law it was not supported by substantial evidence."

Nothing could be further from appellants' intention nor wider of the mark. The language is conventionally used in the cases (see, *e. g.,* in addition to the cases cited in Point III of appellants' main brief, *Gardner* v. *Railroad Retirement Board,* 148 F. (2d) 935, 937 (C. C. A. 5)) to signify that in the "intermediate" cases (*National Labor Relations Board* v. *Hearst Publications,* 322 U. S. 111, 124, 126) there *is* an "in between" zone where the Board's determination, reasonably reached, is conclusive. *Cf. Merrill* v. *Fahs,* 324 U. S. 308, 310. Our formulation of the question, when read in context, intended to refer (1) to the high degree of conclusiveness accorded to the administrative determination, and (2) to the limited scope of judicial review. Far from admitting, even *arguendo,* that the administrative determination in this case was erroneous in any sense our position in the brief was clear. "By the standard of substantial support in the evidence, the Board's finding must be upheld. *Actually it is supported by the great preponderance of the evidence"* (p. 16; see also pages 30, 39).

What appellees have attempted to do in their counter-statement and argument is precisely what not even the courts, in reviewing administrative determinations, have the power to do, to "pick and choose bits of evidence to make findings of fact contrary to the findings of the Commission." *Federal Trade Commission* v. *Educational Society,* 302 U. S. 112, 117.

Repeated assertions in appellees' brief, such as those at page 4, that "LaLone went to work for the Barretts for $200 a month," that "LaLone's compensation of $200 a month continued from August, 1938, to May 1, 1942," and similar statements elsewhere in appellees' brief, are unaccompanied by the disclosure that the $200 was payable only from net profits of the Barrett-LaLone Insurance Agency.

Inasmuch as appellees' brief (pp. 12–13) has quoted from and referred to some of Barrett, Sr.'s, answers in the Partnership Questionnaire, it should be emphasized that Barrett filled out the questionnaire in connection with the *ex parte,* routine investigation of appellees' application for benefits by the Bureau of Old-Age and Survivors Insurance of the Social Security Board. Later, after the Bureau had disallowed the claim and appellees obtained a hearing before a referee, the Barretts appeared as witnesses for appellees and gave more complete testimony. The referee and the Appeals Council obviously had discretion to give greater credence to the testimony (and other evidence) at the hearing. For example, the same Barrett who had signed the Questionnaire, including statements therein purporting to show that LaLone was paid a "salary" of $200 a month, testified at the hearing that "He [LaLone] was to receive $200 a month *out of the net profit*" (*Tr.* 74). This is in accordance with what the unsigned agreement provides (Tr. 117), and what was actually done in practice.

The information contained in the questionnaire is inconclusive. Taken as a whole, it is at least as favorable to the inference that LaLone retained a propri-

etary interest in his insurance business and was co-owner of the Barrett-LaLone Insurance Agency, from whose funds his so-called "salary" was paid, as to the inference that he was an employee. The excerpt quoted from the questionnaire at page 12 of appellees' brief, clearly shows that F. S. Barrett & Co. did not purchase LaLone's business. On the contrary, it states that said Company made him a *loan* on his business *as security,*[1] and admits that, "A bank account was opened up as Barrett-LaLone Insurance Agency, otherwise the business was maintained under two separate heads, notes were paid and he moved out May 1, 1942." This disproves the contention that F. S. Barrett & Co. purchased LaLone's insurance business and that he merely had the right to buy it. Significantly, question 14 (Tr. 102), as to whether income tax returns

[1] The statements at page 6 of appellees' brief that if the arrangement between the parties "didn't prove satisfactory on either part, LaLone could pay the Barretts back their money and take his business," and that "LaLone had the right to buy back his business," imply that F. S. Barrett & Co. purchased LaLone's business. Actually F. S. Barrett & Co. merely made a loan and all that the Barretts claimed was that his business was *security* for the repayment of the loan. See also Barrett, Jr.'s, testimony: "Well, I think we had advanced him certain moneys as a mortgage on his business" (Tr. 55).

By selling his business in 1942 without previous consultation with the Barretts, LaLone convincingly evinced his own understanding of the interest he retained. He did not proceed on the assumption that in 1938 he had no alternative but to sell his business to F. S. Barrett & Co. and become its employee. His action is consistent only with the view that he had solved his problem by obtaining a loan and pooling the insurance businesses under his management. In forming a joint venture it is not unusual for the coadventurers to retain title to specific assets but to pool their use and share profits in agreed proportions. The Barretts never questioned his power or right to dispose of his proprietary interest.

were made on a partnership basis, was left unanswered in the questionnaire. But at the hearing it was disclosed that F. S. Barrett & Co. returned only one-half of the Barrett-LaLone Insurance Agency profit as income (Tr. 71–74).

The contention at page 4 of appellees' brief that the Barretts had ultimate control of the insurance department finds its answer in the evidence, which shows *consultation among* the Barretts and LaLone on questions of policy, *not* control or direction by the Barretts over LaLone. (Appellants' brief, pages 33–34.)

The statements at page 12 of appellees' brief to the effect that, "F. S. Barrett filed Statement of Employer," purporting to show payment of wages to LaLone and that, "These were all signed by Mr. Barrett, Sr., January 15, 1943," neglect to mention that these Statements (Tr. 93, 95, 99) were *not* signed by Barrett, Sr., as President of F. S. Barrett & Co., but in behalf of *Barrett-LaLone Insurance Agency,* and that Barrett-LaLone Insurance Agency is the only name given LaLone's alleged employer. They inadvertently convey the impression that the Statements (not filed until the processing of appellees' application for benefits), purport to show payment of wages by F. S. Barrett & Co. *In fact they show payment by Barrett-LaLone Insurance Agency,* and carry the latter's Identification Number. The "Statement of Employer" is the capstone in the proof that the Barretts did not consider LaLone an employee of F. S. Barrett & Co.

It is plainly an overstatement to say that the record "bulges" with proof that LaLone was an employee. The overwhelming weight of the evidence shows that

LaLone retained his proprietary interest in his insurance business during the period of combined or "pooled" operation of his insurance business and the much smaller insurance business of F. S. Barrett & Co. The Barretts and LaLone considered that he was co-owner of the Barrett-LaLone Insurance Agency. Such evidence as refers to him as an employee, does not do so on the theory that he was an employee of F. S. Barrett & Co., but rather on the theory that his so-called "salary" from the profits of the Barrett-LaLone Insurance Agency could qualify him as having the status of an employee of Barrett-LaLone Insurance Agency under the Social Security Act, notwithstanding his proprietary interest.

A trace of editorial slant is perhaps inevitable in any concise statement of the case. It is respectfully submitted that the referee's decision is unusually free of this failing.

CONCLUSION

The judgment appealed from should be reversed and the decision of the Social Security Board reinstated.

Respectfully submitted.

EDWARD M. CONNELLY,
United States Attorney,
ARNOLD LEVY,
Special Assistant to the Attorney General,
HUBERT H. MARGOLIES,
Attorney, Department of Justice,
Attorneys for Appellants.

U. S. GOVERNMENT PRINTING OFFICE: 1945

No. 11060

In the United States
Circuit Court of Appeals
For the Ninth Circuit

CHESTER W. CRUM, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

BRIEF OF THE UNITED STATES

Upon Appeal from the United States District Court for the District of Oregon.

CARL C. DONAUGH,
United States Attorney for the District of Oregon,

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Assistant United States Attorney,
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CHESTER W. CRUM,
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For Appellant.

STEVENS-NESS LAW PUB. CO., PORTLAND

No. 11060

In the United States
Circuit Court of Appeals
For the Ninth Circuit

CHESTER W. CRUM, *Appellant*

v.

UNITED STATES OF AMERICA, *Appellee*

BRIEF OF THE UNITED STATES

Upon Appeal from the United States District Court for the District of Oregon.

STATEMENT OF FACTS

The appellant, Chester W. Crum, is serving a 25-year sentence in a United States penitentiary as a result of conviction on a plea of guilty in the United States District Court for the District of Oregon in Criminal Case No. C-15153. The indictment is the identical indictment brought before this Honorable Court for consideration in the case of Lloyd H. Bark-

doll, Appellant v. United States of America, Appellee, No. 10858, in which case an opinion was rendered and filed the 15th day of February, 1945. The indictment charged appellant with the violation of Section 88, Title 18, U.S.C.A., in Count One. Counts Two and Three charged violations of Section 588b (a) and (b), Title 12, U.S.C.A., and Count Four was the violation of Section 588c, Title 12, U.S.C.A.

On July 28, 1937, the appellant appeared in Court in person and by his attorney, Hugh L. Biggs, thereupon withdrew his plea of not guilty and entered a plea of guilty as charged in the indictment.

On July 29, 1937, the appellant appeared in Court with his attorney and was sentenced by the Court as follows: On Count One, imprisonment for a period of two years; Count Two, imprisonment for a period of twenty years; Count Three, imprisonment for a period of 25 years and a fine of $1,000; Count Four, imprisonment for a term of 25 years; the said terms of imprisonment all to run concurrently.

This Court has held that Section 588b defines one crime only and that only one sentence can be imposed. See *Lloyd H. Barkdoll v. United States of America*, No. 10858, February 15, 1945.

No. 11060

In the United States Circuit Court of Appeals

For the Ninth Circuit

CHESTER W. CRUM, *Appellant*

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QUESTION INVOLVED

The only question which appears to be involved is whether or not the appellant is now entitled to any relief by way of this appeal, in view of the fact that he is now serving a valid sentence for the offense charged in Count Four of the indictment.

ARGUMENT

It is now clear that appellant should have been sentenced for only one term of imprisonment under Counts Two and Three of the indictment. Count Four of the indictment charged that in committing the offense of bank robbery, the defendant forced a person to accompany him without the consent of that person. The sufficiency of the indictment on this count and the fact that it charges a separate and distinct crime is established by the decision of this Court in the case of *Lloyd H. Barkdoll, Appellant v. United States of America, Appellee,* wherein the Court states:

> "We hold this indictment sufficient as the crime is described as 'that in committing said offense the said defendants did force Oscar Hoverson to accompany them, without his consent'."

We respectfully submit that that decision is controlling in this case as it pertains to the same indictment and the same offense, Barkdoll and the Appellant Crum having been co-defendants in that prosecution.

CONCLUSION

In conclusion, we submit that the appellant's appeal should be dismissed without any relief whatsoever.

Respectfully submitted,

CARL C. DONAUGH,
United States Attorney for the District of Oregon.

MASON DILLARD,
Assist. United States Attorney.

7/30/45—40

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Respectfully submitted,

CARL C. DONAUGH,
United States Attorney for the District of Oregon.

MASON DILLARD,
Assist. United States Attorney.

7/30/45—40

No. 11000

United States

Circuit Court of Appeals

For the Ninth Circuit.

RUBY M. BROWN,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY and FEDERAL DEPOSIT INSURANCE CORPORATION,

Appellees.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon

Rotary Colorprint, 661 Howard Street, San Francisco

No. 11000

United States

Circuit Court of Appeals

For the Ninth Circuit.

RUBY M. BROWN,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY and FEDERAL DEPOSIT INSURANCE CORPORATION,

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Transcript of Record

Upon Appeal from the District Court of the United States for the District of Oregon

Rotary Colorprint, 661 Howard Street, San Francisco

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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In the District Court of the United States
for the District of Oregon

Civil No. 1412

RUBY M. BROWN,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Defendant,

FEDERAL DEPOSIT INSURANCE CORPORATION,

Inter-pleaded Defendant.

AMENDED PRETRIAL ORDER

The above entitled action came on regularly for a pretrial conference on Monday, July 19, 1943, at 10:00 o'clock A.M., before the Honorable James Alger Fee, one of the Judges of the above entitled court. Plaintiff appeared in person and by and through Dey, Hampson & Nelson and James C. Dezendorf, her attorneys. The Defendant New York Life Insurance Company did not appear. The Defendant Federal Deposit Insurance Corporation, the Inter-pleaded Defendant, appeared by and through Maguire, Shields, Morrison & Biggs and Robert F. Maguire, its attorneys. The formal pretrial conference adjourned Tuesday, July 20, 1943, with the understanding that an effort would be made by the parties to agree upon a pretrial order. Thereafter, the parties duly waived a jury and the

case was set for trial for Wednesday, August 11, 1943, at 10:00 o'clock A.M.

AGREED FACTS

I.

Plaintiff is a resident of the State of Oregon. Defendant New York Life Insurance Company is a corporation organized and existing under the laws of the State of New York and is authorized and licensed to engage in the life insurance business in the State of Oregon. The Harney County National Bank of Burns, Burns, Oregon, [26*] is a national banking association, organized and existing under the laws of the United States. The Federal Deposit Insurance Corporation is a corporation organized under and by virtue of the laws of the United States. The matter in controversy exceeds, exclusive of interest and costs, the sum of $3,000.00.

II.

On November 27, 1935, New York Life Insurance Company, in consideration of the payment of the premiums therein specified, issued its policies of life insurance, Nos. 12748022 and 12748023, on the life of Edward N. Brown, in which policies Plaintiff, Ruby M. Brown, was named as beneficiary. In each of the said policies the New York Life Insurance Company agreed to pay to Ruby M. Brown, the beneficiary, the sum of $10,000.00 upon receipt of due proof of the death of Edward N. Brown.

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*Page numbering appearing at foot of page of original certified Transcript of Record.

III.

Edward N. Brown died on or about August 6, 1942, and due proof of his death was thereafter furnished to and received by New York Life Insurance Company and by reason thereof there became due and payable to Ruby M. Brown, the beneficiary, upon said policies, the total sum of $20,582.00.

IV.

New York Life Insurance Company, on or about August 18, 1942, issued, and on August 21, 1942, delivered to Plaintiff two checks, whereby it directed the United States National Bank of Portland (Oregon) to pay to the order of Plaintiff the total sum of $20,582.00.

V.

Plaintiff presented said checks to The United States National Bank of Portland (Oregon) for payment on September 4, 1942, and the said Bank failed and refused to pay Plaintiff any sum thereon and advised her that New York Life Insurance Company had previously countermanded payment thereof. [27]

VI.

Prior to September 4, 1942, when said checks were presented for payment, the Federal Deposit Insurance Corporation notified the New York Life Insurance Company that it had information indicating that the money used in payment of premiums on the above mentioned policies were funds of the Harney County National Bank of Burns, Burns,

Oregon, and Federal Deposit Insurance Corporation notified New York Life Insurance Company that it would claim the right to receive the proceeds of said policies of insurance. New York Life Insurance Company thereupon stopped payment on the two checks above mentioned.

VII.

New York Life Insurance Company does not have nor claim any right or interest in or to the proceeds of said policies of insurance and it is entitled to be discharged from any further liability to either Plaintiff or the Federal Deposit Insurance Corporation upon payment into the registry of this Court of the sum of $20,582.00, less its costs and disbursements herein incurred and such sum as may be allowed to it for attorneys' fees.

VIII.

Edward N. Brown paid the premiums due on the New York Life Insurance Company policies issued on his life by checks, which said checks were received at the Boise, Idaho, office of the New York Life Insurance Company on the following dates:

Policy No. 12748022	Policy No. 12748023
November 29, 1935	February 6, 1936
October 21, 1936	January 11, 1937
September 11, 1937	November 3, 1937
December 2, 1938	December 31, 1938
October 21, 1939	October 21, 1940
December 28, 1940	

IX.

All of the checks forwarded by Edward N. Brown in payment of premiums and received by the New York Life Insurance Company were [28] drawn upon the Harney County National Bank of Burns, Burns, Oregon, except the payment of December 28, 1940, upon policy No. 12748022, and it has been impossible to determine upon what Bank said check was drawn.

X.

The check received by the New York Life Insurance Company on November 29, 1935, in payment of the first premium on policy No. 12748022 was drawn upon Edward N. Brown's personal account in the Harney County National Bank of Burns, Burns, Oregon, and was charged against his account on December 2, 1935. The records of the bank disclose credits to said account and contain corresponding deposit slips, carrying notations as follows: October 31, 1935, $160.00, salary from said bank for the month of October, 1935; November 30, 1935, $160.00, salary from said bank for the month of November, 1935; December 2, 1935, $150.00, currency. The ledger sheet balance on December 2, 1935, was $349.56, composed of said items.

XI.

The check received by the New York Life Insurance Company on October 21, 1936, in payment of the second premium on policy No. 12748022 was drawn upon Edward N. Brown's special account in the Harney County National Bank of Burns, Burns,

Oregon, and was charged against his account on October 23, 1936. The records of the bank disclose credits to said account and contain corresponding deposit slips, carrying notations as follows: October 16, 1936, $300.00, D. W. Williams; (1) October 13, 1936, $45.00, Paul Jackson, repayment; (2) October 3, 1936, $336.12 (American Aircraft $250.00, currency $50.00, transfer from personal account $36.12); (3) September 2, 1936, $1154.88 (transfer from personal account $145,48, Blyth & Co. $1,009.40); August 24, 1936, $242.85, J. R. Jenkins & Son. The ledger sheet balance on October 23, 1936, was $2045.00, composed of said items.

Neither Federal Deposit Insurance Corporation nor Plaintiff [29] have any direct evidence to explain items (1) and (2), except that with respect to that portion of item (2) "American Aircraft $250.00", it is admitted that a check in that amount drawn by American Aircraft Co. and payable to Edward N. Brown was received by him on that date. With respect to that portion of item (2) "transfer from personal account $36.12", it is admitted that there is a charge against Edward N. Brown's personal account in the Harney County National Bank of Burns, Burns, Oregon, on October 3, 1936, in the amount of $36.12, at which time the records of the Bank disclose credits to his personal account and contain corresponding deposit slips, carrying notations as follows: September 30, 1936, $195.00, September salary; August 31, 1936, $195.00, August salary. The ledger sheet balance on October 3, 1936, in his personal account was $204.72, composed of

said items. With respect to that portion of item (3) "Blyth & Co. $1,009.40", Blyth & Co.'s records show that it remitted to Edward N. Brown this amount as the proceeds of the sale of a Miller and Lux $1,000.00 bond. It is admitted that there was no Miller and Lux bond among the assets of the Bank. With respect to that portion of item (3) "August 24, 1936, $242.85, J. R. Jenkins & Son", it is admitted that checks totaling that amount were on that date deposited to the credit of Edward N. Browns' account and said checks were charged against the accounts of the drawers.

XII.

The check received by the New York Life Insurance Company on September 11, 1937, in payment of the third premium on policy No. 12748022 was drawn upon Edward N. Brown's personal account in the Harney County National Bank of Burns, Burns, Oregon, and was charged against his account on September 14, 1937. The records of the Bank disclose credits to said account and contain corresponding deposit slips, carrying notations as follows: August 31, 1937, $225.00, salary from said Bank for the month of August, 1937; July 31, 1937, $225.00, salary for the month of July, 1937; June 30, 1937, $225.00, salary for the month of June, 1937. The ledger sheet balance on September 14, 1937, was $533.49, composed of said items.

XIII.

The check received by the New York Life Insurance Company [30] on December 2, 1938, in payment of the fourth premium on policy No. 12748022 was drawn upon Edward N. Brown's personal account in the Harney County National Bank of Burns, Burns, Oregon, and was charged against his account on December 5, 1938. The records of the bank disclose credits to said account and contain corresponding deposit slips, carrying notations as follows: (1) December 5, 1938, $175.00, from Edward N. Brown grain account; November 30, 1938, $250.00, salary from said Bank for the month of November, 1938. The ledger sheet balance on December 5, 1938, was $313.06, composed of said items.

With respect to item (1), it is admitted that Edward N. Brown's grain account shows a charge against that account in that amount on that date.

XIV.

The check received by the New York Life Insurance Company on October 21, 1939, in payment of the fifth premium on policy No. 12748022 was drawn upon Edward N. Brown's special account in the Harney County National Bank of Burns, Burns, Oregon, and was charged against his account on October 24, 1939. The records of the Bank disclose credits to said account and contain corresponding deposit slips, carrying notations as follows: October 24, 1939, $350.00, Kidwell and Caswell; (1) October 23, 1939, $656.90 (cash $250.00, Kidwell and

Caswell $406.90). The ledger sheet balance on Octoger 24, 1939, was $366.78, composed of said items.

That portion of item (1) "Kidwell and Caswell $406.90" represents the amount received by Edward N. Brown from Kidwell and Caswell on October 23, 1939, for the sale of livestock on the North Portland Market. (See Paragraph E.)

XV.

The check received by the New York Life Insurance Company on February 6, 1936, in payment of the first premium on policy 12748023 was drawn upon Edward N. Brown's special account in the [31] Harney County National Bank of Burns, Burns, Oregon, and was charged against his account on February 10, 1936. The records of the Bank disclose credits to said account and contain corresponding deposit slips, carrying notations as follows: (1) February 10, 1936, $64.00, Pete Obiaque; (2) February 5, 1936, $144.94, transfer from Edward N. Brown's personal account; (3) February 5, 1936, $247.88, Burns Lodge; December 31, 1935, $278.76, checks. The ledger sheet balance on February 10, 1936, was $661.20, composed of said items.

With respect to item (1), it is admitted that on or about February 10, 1936, Pete Obiaque paid Edward N. Brown $64.00 for rental of some pasture land, owned or controlled by Edward N. Brown. With respect to item (2), it is admitted that on February 5, 1936, there is a charge against Edward N. Brown's personal account for $144.94, at which time the records of the Bank disclose credits to

his personal account and contain corresponding deposit slips, carrying notations as follows: January 30, 1936, $195.00, January salary; December 31, 1935, $75.00, dividends on Harney County National Bank stock; December 31, 1935, $165.00, December salary. The ledger sheet balance on February 5, 1936, in his personal account was $331.91, composed of said items. With respect to item (3), it is admitted that on or about February 5, 1936, Burns Lodge gave Edward N. Brown $247.88 to purchase city bonds to be used in payment of street liens against property owned by it and that Burns Lodge subsequently received from Edward N. Brown the city bonds.

XVI.

The check received by the New York Life Insurance Company on January 11, 1937, in payment of the second premium on policy No. 12748023 was drawn upon Edward N. Brown's special account in the Harney County National Bank of Burns, Burns, Oregon, and was charged against his account on January 13, 1937. The records of the Bank disclose credits to said account and contain corresponding deposit [32] slips, carrying notations as follows: (1) December 31, 1936, $124.40 (dividends from Harney County National Bank Stock $75.00, transfer from his personal account $49.40); December 16, 1936, $300.00, D. W. Williams; October 13, 1936, $45.00, Paul Jackson, repayment; October 3, 1936, $336.12 (American Aircraft $250.00, currency $50.00, transfer from Edward N. Brown personal account

$36.12) ; September 2, 1936, $1,154.88 (transfer from Edward N. Brown personal account $145.48, Blyth & Company $1,009.40) ; August 24, 1936, $242.85, J. R. Jenkins & Son. The ledger sheet balance on January 13, 1937, was $1,872.20, composed of said items.

With respect to item (1), it is admitted that on December 31, 1936, Edward N. Brown received and deposited in his special account $75.00 received as a dividend on stock owned by him in the Harney County National Bank of Burns, Burns, Oregon. With respect to that portion of item (1) "transfer from his personal account $49.40", it is admitted that on that date there is a charge against Edward N. Brown's personal account for $49.40, at which time the records of the Bank disclose credits to his personal account and contain corresponding deposit slips, carrying notations as follows: December 31, 1936, $195.00, December salary; November 30, 1936, $195.00, November salary; October 31, 1936, $195.00, October salary. The ledger sheet balance on December 31, 1936, in his personal account was $260.82, composed of said items. For explanation of the balance of the items see explanation in paragraph XI above, since the items are the same.

XVII.

The check received by the New York Life Insurance Company on November 3, 1937, in payment of the third premium on policy No. 12748023 was drawn upon Edward N. Brown's personal account in the Harney County National Bank of Burns,

Burns, Oregon, and was charged against his account on November 8, 1937. The records of the Bank [33] disclose credits to said account and contain corresponding deposit slips, carrying notations as follows: (1) November 3, 1937, $109.38 (Hearst Publication Bond $100.00, coupons $9.38); October 30, 1937, $225.00, salary from said Bank for the month of October, 1937; October 21, 1937, $240.00, currency. The ledger sheet balance on November 8, 1937, was $544.44, composed of said items.

With respect to item (1), it is admitted that this represents the proceeds of the sale of a Hearst Publication Bond, which had been given to Edward N. Brown some years before by Plaintiff and Leon M. Brown.

XVIII.

The check received by the New York Life Insurance Company on December 31, 1938, in payment of the fourth premium on policy No. 12748023 was drawn upon Edward N. Brown's personal account in the Harney County National Bank of Burns, Burns, Oregon, and was charged against his account on January 3, 1939. The records of the Bank disclose credits to said account and contain corresponding deposit slips, carrying notations as follows: December 31, 1938, $75.00, dividends on stock of Harney County National Bank of Burns, Burns, Oregon; December 31, 1938, $250.00, salary from said bank for the month of December, 1938. The ledger sheet balance on January 3, 1939, was $309.81, composed of said items.

XIX.

The check received by the New York Life Insurance Company on October 21, 1940, in payment of the fifth premium on policy No. 12748023 was drawn upon Edward N. Brown's personal account in the Harney County National Bank of Burns, Burns, Oregon, and was charged against his account on October 24, 1940. The records of the Bank disclose credits to said account and contain corresponding deposit slips, carrying notations as follows: (1) October 23, 1940, $833.00, F. M. Beck check; (2) October 22, 1940, $2,437.60, Thomas and Frank Mahon check. The ledger sheet balance on October 24, 1940, was $3191.35, composed of said items.

With respect to items (1) and (2), it is admitted that they [34] represent the proceeds of livestock sold by Edward N. Brown, which were deposited to his personal account.

Note as to Paragraphs X to XIX, inclusive: Defendant Federal Deposit Insurance Corporation does not admit that any of said credit items were proper items of credit or that on the dates they were recorded that Edward N. Brown had any actual credit balance in said Bank.

XX.

Federal Deposit Insurance Corporation has paid all of said Bank's customers' or depositors' accounts in which shortages were claimed, irrespective of whether the alleged loss was more or less than $5,000.00.

XXI.

Federal Deposit Insurance Corporation filed a claim in the Estate of Edward N. Brown, deceased, on or about February 11, 1943, in the amount of $388,669.26 as the amount determined due as of January 1, 1943, reserving the right to file an amended claim, should further investigation disclose further debits and credits which should be added to the claim. On or about the 28th day of July, 1943, the Federal Deposit Insurance Corporation filed a supplemental claim in the Estate of Edward N. Brown, deceased, in the amount of $24,182.09.

XXII.

Continuously between the date the policies of insurance were issued and the death of Edward N. Brown, he was employed by the Harney County National Bank in the following capacities, during the times hereinafter mentioned:

Assistant Cashier, January 12, 1932, to January 11, 1938. Director, January 7, 1936, to August 6, 1942. Vice President, January 11, 1938, to August 6, 1942, and had been employed by said Bank as teller and in other capacities at least in 1927 and until January 12, 1932. [35]

That the directors of said Bank, being entirely ignorant of any wrongful acts, embezzlements, misappropriations or defalcations on the part of the said Edward N. Brown of any of the property or assets of the Bank or of any breaches of trust of duty on his part, authorized and fixed his salary in the monthly sums mentioned in said deposit slips as

salaries and authorized him to draw on said amounts.

XXIII.

Edward N. Brown took his own life on August 6, 1942, while the National Bank Examiners were making an examination of the Harney County National Bank of Burns, Burns, Oregon.

XXIV.

At all times herein concerned, the Harney County National Bank of Burns, Burns, Oregon, paid to Federal Deposit Insurance Corporation the necessary assessments, so that its depositors' accounts were insured by Federal Deposit Insurance Corporation in accordance with the provisions of 12 U.S.C.A., Section 264.

[Notation]: Amendment allowed F 8/3/43.

STIPULATED EVIDENCE

The Federal Deposit Insurance Corporation contends that the following facts are material on the question of whether the payments of premiums on said insurance policies were paid by funds or property of the Harney County National Bank:

A.

That during the period of Edward N. Brown's employment by the Bank he embezzled and misappropriated funds and property of the bank in the following amounts:

$176,963.06	(Exhibit 26)
67,500.00	(Exhibit 26)
1,480.00	(Exhibit 26)

142,726.20	(Exhibit 26)
17,143.61	(Exhibit 30)
7,038.48	(Exhibit 30)
1,752.16	(Exhibit 35)
500.00	(Exhibit 37)
1,674.22	(Exhibit 36)

B.

That of said sums the said Edward N. Brown embezzled and misappropriated funds and property of the Bank by means of false entries, withheld deposits made by depositors of said Bank, and by unauthorized and wrongful withdrawls from credits and accounts of depositors in said Bank as follows: [36]

		A Net Amt. of:
Prior to the Year 1935		$ 5,869.25
In the Year 1935		12,893.21
In the Year 1936		3,031.52
In the Year 1937		17,996.84
In the Year 1938		40,982.14
In the Year 1939		93,203.44
In the Year 1940		39,780.33
In the Year 1941:		
Embezzlements	$93,272.41	
Restitutions	93,762.40	
Excess of restitutions	489.99	489.99
In the Year 1942		10,319.61
Total		$223,586.35

(Exhibit 34)

C.

That by reason of an agreement with the Harney County National Bank dated August 29, 1942, the Federal Deposit Insurance Corporation acquired, and ever since said date has been the owner of, the assets of the Bank, including all contracts, rights, claims, demands and choses in action or causes whatsoever, pending causes of action, and judgments, whether known or unknown, which the said Bank owned, held or had, or owns, holds or has against any person or persons whomsoever, including among other things all those against its officers, directors or employees or their sureties arising out of any action of any such persons in respect to the Bank or its property, or arising out of the nonperformance or manner of performance of their duties, and any claims against any person for money or property of the Bank or for damages which the Bank may have or own.

The plaintiff admits the execution of the document but denies that the Federal Deposit Insurance Corporation succeeded or became subrogated to the rights of the Bank or its depositors. [37]

Plaintiff does not concede the truth of the facts alleged in paragraphs A to C, admits that Federal Deposit Insurance Corporation could produce evidence to support the facts as alleged, waives their production, contends that said evidence is incompetent, irrelevant and immaterial, and, if it is admitted at the trial or considered by the Court, the Plaintiff requests that the following facts be admitted and considered. If the following facts are

admitted and considered, Federal Deposit Insurance Corporation admits that Plaintiff could produce evidence to support the facts as alleged, waives their production, and contends that said evidence is incompetent, irrelevant and immaterial.

A.

Plaintiff and her husband, Leon M. Brown, during the period herein concerned, loaned various sums of money to Edward N. Brown, and made gifts to him as follows:

February 27, 1930, Leon M. Brown made a gift of $2300.00.

May 3, 1930, Leon M. Brown loaned $339.00.

September 20, 1938, Leon M. Brown loaned $500.00.

April 22, 1939, Leon M. Brown loaned $500.00.

September 19, 1939, Leon M. Brown loaned $500.00.

May 29, 1940, Leon M. Brown loaned $500.00.

July 15, 1940, Leon M. Brown loaned $500.00.

September 14, 1940, Plaintiff loaned $500.00.

September 20, 1940, Plaintiff loaned $500.00.

July 11, 1941, Leon M. Brown loaned $500.00.

All of the loans were repaid by Edward N. Brown before his death.

V.

From time to time while Edward N. Brown was employed at the Bank (the exact dates not being known), Edward N. Brown sold for Plaintiff and Leon M. Brown the following securities: [38]

Bonds

$1,000.00 Minneapolis, St. Paul & St. Marie Railway.

$1,000.00 Great Northern Railway General Mortgage Bond.

$1,000.00 Miller and Lux.

$500.00 American Telephone and Telegraph.

Stocks

17 shares Masonic Building Association.

2 shares Seattle Chamber of Commerce.

2 shares Northwestern Electric Company.

2 shares Hearst Publications, Inc.

Plaintiff and Leon M. Brown received all the proceeds from the sale of the securities above mentioned before the death of Edward N. Brown.

C.

Between 1935 and the time of his death, Edward N. Brown acquired ranches in the vicinity of Burns, Oregon, by purchase and on contracts, as follows: [39]

November 16, 1935: Acquired Porter-Field tract from Harney County Sheriff, paid $73.93.

March 9, 1938: Acquired assignment of mortgage upon the Sieloff ranch from Felix Urizar, paid $175.00.

March 14, 1938: Acquired portion of Sieloff ranch by deed from Frank Kueny, paid $10.00.

April 5, 1938: Acquired Denstedt ranch from the State Land Board, paid $160.00.

April 13, 1938: Acquired Gozad and Denstedt ranches from Federal Land Bank, Spokane, paid $700.00.

August 22, 1938: Acquired Allen field ranch from State Land Board, paid $135.26.

February 11, 1939: Acquired Catterson ranch from Federal Land Bank, Spokane, paid $150.00.

April 15, 1939: Acquired Max Sieloff and Katherine Sieloff land from Sheriff of Harney County, paid $750.00.

July 13, 1940: Acquired Lee Iland ranch, paid $10.00.

September 16, 1940: Acquired 718 acre ranch from the Sheriff of Harney County, paid $360.00.

November 28, 1940: Acquired Bolton ranch, paid Federal Land Bank $300.00.

December 28, 1940: Acquired ranch from J. R. Rush, paid $100.00.

June 23, 1941: Acquired ranch from Francis Griffin, paid $600.00.

July 12, 1941: Acquired four tracts of land north of Lawen, Oregon, paid Sheriff of Harney County $312.50.

July 26, 1941: Acquired Dr. Iland Catterson ranch, paid Lee Iland $10.00.

December 8, 1941: Acquired Sam Goodman ranch, paid Clarence Fitchett $500.00.

D.

Edward N. Brown operated the ranches and properties above set forth, raised crops and ran livestock thereon from 1935 until [40] his death. He also rented and operated the following properties from plaintiff and Leon M. Brown:

Year	Description	Crop	Annual Rental Paid
1940-41	Jordan ranch (Ruby M. Brown ¼ interest)	Hay	$400.00
1940-41	Valley Ranch (M. Brown & Sons, Inc., owner)	Hay, grain pasture	$400.00

On July 12, 1935, Edward N. Brown entered into a contract with Bessie K. Hillman for the purchase of 2560 acres of land near Burns. The total purchase price to be paid was $3508.84, which was paid in various installments until September 2, 1939, when the contract was paid in full and a deed to the property was executed to Edward N. Brown. This property was subsequently sold to the United States on February 27, 1940, for a consideration of $10,060.00, which was represented by Government check mailed to Edward N. Brown from Portland, Oregon, on March 16, 1940. [41]

E.

During the period commencing October 4, 1938, until the end of 1940, Edward N. Brown sold livestock on the North Portland market through Kidwell and Caswell, North Portland Commission Merchants and remittances were made to him by Kidwell and Caswell as follows:

October 24, 1938	$ 492.92
November 21, 1938	257.86
November 21, 1938	320.85
December 19, 1938	477.86
January 23, 1939	688.74
February 6, 1939	1,052.10
March 1, 1939	524.93

March 13, 1939	368.39
April 10, 1939	662.78
September 6, 1939	716.30
October 2, 1939	524.81
October 9, 1939	502.11
October 16, 1939	893.63
October 19, 1939	480.91
October 19, 1939	406.90
October 26, 1939	466.57
November 7, 1939	10.55
December 20, 1939	341.30
January 24, 1940	264.67
July 2, 1940	279.78
September 23, 1940	793.94
October 7, 1940	984.49
October 24, 1940	428.73
November 18, 1940	72.75
November 19, 1940	345.10
December 2, 1940	1,709.53
December 16, 1940	1,284.80
	$15,353.30

F.

During the period herein involved, Edward N. Brown maintained in the Harney County National Bank a commercial account, known as a "grain account." Attached hereto, marked Exhibit "A", is a photostatic copy of the ledger cards covering said account, showing the debits, credits and balances carried in said account.

G.

During the period herein involved, Edward N. Brown had a savings account in the Harney County National Bank of Burns, Burns, Oregon. Attached hereto, marked Exhibit "B", are photostatic copies of the ledger cards covering said account, showing the debits, credits [42] and balances carried in said account. This account was built up by Plaintiff and Leon M. Brown after the birth of Edward N. Brown, by gifts to him until the account reached $1300.00 on July 2, 1931, after which all deposits and withdrawals were made by Edward N. Brown.

H.

During the period herein involved, Edward N. Brown maintained in the Harney County National Bank a commercial account, known as a "steer account." Attached hereto, marked Exhibit "C", is a photostatic copy of the ledger cards covering said account, showing the debits, credits and balances carried in said account. [43]

CONTENTIONS OF THE PARTIES

A.

Federal Deposit Insurance Corporation contends that the premiums paid by Edward N. Brown upon the policies of insurance on his life issued by New York Life Insurance Company were paid from and out of the funds of the Harney County National Bank of Burns, Burns, Oregon, which said funds were wrongfully and unlawfully embezzled, appro-

priated and converted by the said Edward N. Brown and by reason thereof Federal Deposit Insurance Corporation became and were the owners of said policies of insurance and is entitled to a judgment and decree awarding to it the full sum deposited in the registry of this court by New York Life Insurance Company.

B.

Plaintiff denies that Edward N. Brown paid the premiums upon the policies issued on his life by New York Life Insurance Company from funds embezzled, or misappropriated from the Harney County National Bank of Burns, Burns, Oregon, and contends that she, as the beneficiary under both of said policies, is entitled to a judgment and decree awarding to her the full sum deposited in the registry of this court by New York Life Insurance Company.

C.

The Federal Deposit Insurance Corporation contends that it is the owner of all the assets, property, choses and rights of action and suit owned or possessed by the Harney County National Bank of Burns and that it is the owner of all the proceeds arising out of policies of insurance 12748022 and 12748023, being $10,327.00 and $10,255.00 respectively.

ISSUES OF FACT TO BE DETERMINED

I.

To what extent, if at all, the premiums on the

policies were paid with funds wrongfully embezzled or misappropriated from the [44] Harney County National Bank of Burns, Burns, Oregon?

II.

What were the sources from which the premiums on policies were paid to the insurance company?

ISSUES OF LAW TO BE DETERMINED

I.

Whether Federal Deposit Insurance Corporation succeeded to or became subrogated to the Bank's rights, if any, as against the proceeds of the insurance policies upon the life of Edward N. Brown.

II.

Whether the various premium payments were paid with funds belonging to Edward N. Brown or with funds wrongfully embezzled or misappropriated from the Harney County National Bank of Burns, Burns, Oregon.

III.

Are the items of deposit which are constituted by salary paid by the Bank to Brown and placed in his account, moneys belonging to Brown which constitute an actual credit to the account?

IV.

If Brown, at the time of drawing said salaries, was guilty of embezzlement, misappropriations, defalcations or other breach of trust in his dealings

with the Bank, was he entitled to any compensation from the Bank?

V.

If it be held that Brown was not entitled to any compensation from the Bank, were the funds that he drew as compensation funds wrongfully embezzled, misappropriated or converted from the Bank?

VI.

Must the Federal Deposit Insurance Corporation show that any particular item of deposit in Brown's account was embezzled or the proceeds of embezzled funds or property before it is entitled [45] to the benefit of any particular premium payment or is it entitled to the benefit of any and all premium payments unless plaintiff shows that any particular items deposited in Brown's account in fact belonged to Brown and were not embezzled from the Bank or the proceeds of embezzled funds?

VII.

Does the fact that Brown embezzled and misappropriated or wrongfully converted moneys, funds or property belonging to the Bank automatically extinguish, without a charge or set off by the Bank, any items of deposit of his own funds in any account upon which checks in payment of premiums were drawn?

VIII.

If it be found that Brown had embezzled, misappropriated or wrongfully converted funds or property of the Bank, exceeding the amount of any

items of deposit in his accounts, at or before the time of the charging of any check for premiums, whatever may have been the source of such items, is the Defendant entitled to the benefit of the premium payment so made?

IX.

If no evidence appears as to the source of funds used in payment of the last premium, who is entitled to the benefit of that premium payment?

X.

If the total of the deposits in any account at any time is composed of Brown's own funds and funds of the bank, who is entitled to the benefit of the premium payment made from said account if the premium payment be less than the amount of his own funds; if it be more than his own funds?

XI.

It is conceded that the Oregon Supreme Court in Jansen v. Tyler, 151 Ore. 268, has announced a rule which, if applicable to this case, would award to Defendant that proportion of the proceeds [46] of the policies which the premiums paid from funds or property embezzled, misappropriated or wrongfully converted by Brown from the Bank bear to the total premiums paid.

The Defendant contends that if in any case Brown had a balance in his account made up in part of funds or property misappropriated, embezzled or wrongfully converted from the Bank and

part from other funds, Defendant is entitled to the benefit of the whole premium payment thus paid.

Plaintiff disputes this and contends that as a matter of law Brown would be held to have withdrawn from a mixed fund, first, his own funds, and if his own funds were sufficient to pay the whole premium payment that the Bank would not be entitled to any benefit from that payment.

Substituted page 8/3/43 F

Ex. No.	Plaintiff's Pre-Trial Exhibits	
1	Check dated February 27, 1930	$230.00
2	Check dated May 3, 1930	339.00
3	Check dated September 20, 1938	500.00
4	Check dated April 22, 1939	500.00
5	Check dated September 19, 1939	500.00
6	Check dated May 29, 1940	500.00
7	Check dated July 15, 1940	500.00
8	Check dated September 14, 1940	500.00
9	Check dated September 20, 1940	500.00
10	Check dated July 11, 1941	500.00
11	Original savings account ledger.	
12	Grain account ledger.	
13	Hillman Contract, July 12, 1935.	
14	Hillman Deed, September 2, 1939.	
15	Letter, September 15, 1942.	
16	Steer account ledger.	
17	F. M. Beck check.	
18	F. M. Beck check stub.	
19	Leon M. Brown check stub.	
20	Vacant numbers.	
21	" "	
22	" "	

Ex. No.	Plaintiff's Pre-Trial Exhibits
23	Vacant numbers.
24	" "
25	" " [47]
26	Proof of claim.
27	Detail items of proof of claim.
28	Depositions of Leon M. Brown, Ruby M. Brown and Alfred L. Brown.
29	Deposit slips.
30	Supplemental claim of Federal Deposit Insurance Corporation, $24,182.09.
31	Detail items making up Supplemental Claim of Federal Deposit Insurance Corporation.
32	Supporting data to the Supplemental Claim.
33	National Bank Examiner's report of February 11, 1942.
34	Recapitulation of shortages and restitutions from savings and commercial accounts prior to 1935 and subsequent to and including the time of death of Edward N. Brown.
35	7 checks drawn by Edward N. Brown and 2 tax receipts to Edward N. Brown; checks late 1934 to 1938, total $2252.16.
36	4 checks: Check dated 7/15/31 to 20-30 Club, $10.37; Check dated 9/12/40, $363.85, Pari-Mutuel Fund; Check 7/23/42, $800, Edward N. Brown Special Account; Check 6/1/42, $500, Edward N. Brown Special Account.
37	Check June 11, 1942, $500, Edward N. Brown Special Account.
38	List of notes payable to the bank but not carried in its loan and discount accounts.

No. Ex. Plaintiff's Pre-Trial Exhibits

39 Certified copy of resolution of Board of Directors of Federal Deposit Insurance Corporation of September 1, 1942.

40 Agreement of August 29, 1942, Federal Deposit Insurance Corporation and Harney County National Bank of Burns, 16 pages.

40-A Copy of excerpts from last few pages of defendant's pre-trial exhibit 40.

41 Bank register.

42 Statement at close of business August 29, 1942, Harney County National Bank of Burns.

43 Minute book, Harney County National Bank of Burns, pages 535 to 730, and loose pages 311 to 534 of minute book.

44 Airplane license and date of purchase by Edward N. Brown.

45 Ledger Sheets, Harney County National Bank, Edward N. Brown, Special Account.

46 Ledger sheets, Harney County National Bank, Edward N. Brown General Account.

47 Savings general ledger.

48 Defalcation account, general ledger. [48]

49 2 pages, Ruby M. Brown Savings Account, with memorandum of reconciliation on final balance.

50 Ledger sheets, Leon M. Brown and Ruby M. Brown joint account.

51 Copy of Inventory and Appraisement in Estate of Edward N. Brown, Deceased. [49]

[Notation]: Substituted page. 8/3/43. F.

The foregoing is a pretrial order agreed upon at a conference between counsel and the court. It shall not be amended at the trial except by consent or to prevent manifest injustice. It supersedes the pleadings, which now pass out of the case.

The foregoing Pretrial Order is hereby approved and entered.

Dated at Portland, Oregon, this 13th day of August, 1943.

JAMES ALGER FEE
Judge

Order Approved:

/s/ JAMES C. DEZENDORF
Of Attorneys for Plaintiff

/s/ ROBERT F. MAGUIRE

except as to that portion providing that this order supersedes the pleadings.

Of Attorneys for Federal Deposit Insurance Corporation, Inter-pleaded Defendant.

[Endorsed]: Filed Aug. 13, 1943. [50]

[Title of District Court and Cause.]

June 12, 1944

OPINION

James Alger Fee, District Judge.

On November 27, 1935, the New York Life Insurance Company issued two policies of insurance on the life of Edward N. Brown in the sum of $10,000.00 each, in which policies Ruby M. Brown was

named as beneficiary. The premiums on these policies were, with one exception, paid by checks drawn upon the Harney County National Bank of Burns, Oregon, and dated from November 29, 1935, to October 21, 1940.

Edward N. Brown was employed by the Harney County National Bank beginning in the year 1927, as teller, and in other capacities. On January 12, 1932, he became assistant cashier and on January 7, 1936, he also became a director. Upon becoming vice president on January 11, 1938, which office he held until his death on August 6, 1942, he gave up the position of assistant cashier.

During the years of his connection with the bank, [51] Brown embezzled $416,000.00. The audit shows that the net amount of defalcations from customers' accounts alone amounted to approximately $6,000.00 before 1935 and to over $12,000.00 during that year. The schedule of further withdrawals from this source alone, during the stated periods, follows:

1936	$ 3,031.52
1937	17,996.84
1938	40,982.14
1939	93,203.44
1940	39,780.33

Brown carried a personal account, a special account and a commercial account at the bank in which he deposited sums from various sources. At no time was the total amount in all of these accounts, on any particular date, equal to the sum of his defalcations to that date from commercial accounts of the bank alone.

There were showings that Brown owned properties for which he had paid cash, that he had received loans and had sold property and received the purchase price, and that he had received gifts. Taking all these matters into consideration, the total amount thereof did not equal the amount of defalcations at any time. When the defalcations were about to be discovered by bank examiners, Brown committed suicide.

Ruby M. Brown, as beneficiary, made claim for the full amount of the insurance policies. Two checks were issued to her for a total sum of $20,-582.00 by the insurance company. Upon discovery that the Federal Deposit Insurance Corporation had a claim, the insurance company stopped payment upon these checks. Upon commencement of this action [52] by Ruby M. Brown, against the insurance company, it answered by depositing these funds in court and asking for an order requiring the claimants to interplead. Based upon a stipulation, an order entered discharging the New York Life Insurance Company of liability and setting up adversely the claims of plaintiff and the Federal Deposit Insurance Corporation.

A pretrial conference was held between the Federal Deposit Insurance Corporation, intervenor, which was the assignee of the assets of the Harney County National Bank, and Ruby M. Brown, the mother and beneficiary of the insurance policies on the life of Edward N. Brown. The results of this conference were crystallized in a pretrial order

which accurately defines the questions of fact and law to be answered by the court.

The matter thus arises between the beneficiary (who paid nothing therefor) of insurance policies upon the life of an embezzler and the assignee of the assets of the bank from which he embezzled. The cardinal factor is, that no item of the embezzled funds is traced directly into the premiums of the insurance policies, nor into the bank accounts, which Brown maintained with the Harney County National Bank.

This cause is complicated by the geometrical increase of the fact-pattern. Reduced primarily to the lowest terms, it is relatively simple of solution. First, if Brown were alive, could the bank recover from him the moneys paid out by virtue of checks drawn by him and from his transferee without notice, but without consideration.

The sole ground of recovery by the bank against the transferee would be that a trust had been erected by the [53] use of money of the bank in that transfer.

In order to further clear the ground, a distinction must be drawn between transactions which are consensual and in the normal course of business, and those which are colored by the proven fraud.

In the first category are placed dealings presumed to be innocent between solvent parties and which occur as ordinary commercial transactions. Thus, where a person brings cash into a bank which accepts it, the relation is that of debtor and creditor. When such a customer writes a check, the bank

pays out its own money but is entitled by the implied contract of deposit, to charge to the account of the customer, the amount thereof. If the customer writes and presents a check for more than he has originally turned over to the bank, there is no obligation to honor the demand. If the bank does pay the check, the transaction is a loan to the customer. The drawee, even if he paid no value therefor, is not liable to the bank.

If the bank loans money to the customer and the loan has matured, the bank has a right at any time to set off the amount owed to it against the amount owed by it. The bank thereby becomes liable only for the remaining balance of its debt to the customer, if there be any. But if the bank does not exercise this right of set-off, and in the face of the obligation of the customer to it, pays the check, it will have no recourse against the drawee of the check and can neither recapture the money nor follow the proceeds thereof.

Likewise, a solvent corporation may pay the personal debts of its officers and directors by corporate check and while there is no doubt of its right, itself or through its [54] assignee, to recover from the officers, it has no right against the payee, although the face of the check conveyed notice of the transaction and even though no value was given therefor.[1]

Also, a corporation which is solvent may make an agreement with its officers who are the sole

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[1] Sweet vs. Lang, 14 F. (2d) 762.

stockholders, to make payments on insurance policies upon the lives of each of these respectively. If the agreement is carried out, there will be no right upon the part of the corporation or its assignee to recover the proceeds of the policies,[2] when it becomes insolvent.

Now there is a like distinction to be observed in considering relations which are given sanction by the courts as trusts. Shortly, express trusts and implied trusts such as those called resulting trusts, are consensual in origin. With such relationships, the presumptions of innocence and fair dealing apply. A constructive trust, on the other hand, is one imposed by law because of proven fraud, duress or undue influence exercised by the party charged.

In cases of express trusts, since it is assumed the trustee is acting innocently so long as he maintains a balance sufficient to cover the exact amount of the trust fund in a bank account, he is given credit for paying out his own funds in any expenditure.[3] Therefore, if he purchases life insurance by check upon the same bank account, the premiums are deemed his and the proceeds of the policies [55] inure to his beneficiary. If the trustee has two trust funds, one of which was given him for the purpose of insurance, and he did purchase insurance and there was not sufficient to cover both funds remaining, it will be presumed that he paid the prem-

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[2] Oliver vs. Northwestern Mutual Life Ins. Co., 2 F. Supp. 266.

[3] See Portland Building Co. vs. State Bank of Portland, 110 Oregon 61.

iums out of the fund entrusted to him for that purpose.[4] It is likewise held that where the trustee of an express trust reduces the amount in the bank where he had deposited his own funds and trust funds, below the sum of the trust moneys, and thereafter introduces into the account his own money, the latter sum is not in restitution, but is assumed to remain his in the absence of clear intention to make restitution. The presumption here again is in favor of fair dealing. It is assumed that the trustee withdrew the moneys from the trust in accordance with the purposes thereof. Finally, it is held that where there is an express trust, and the trustee is dead and cannot explain the mingling of funds, the burden of tracing remains with the cestui que trust.[5] Here again, the presumption of innocence prevails.

But the courts are equally clear in holding that where the trustee of an express trust comingles funds and is unable to explain the transaction, the whole becomes a trust fund.[6] This is because the presumption has been dissipated.

When the field of constructive trusts is approached, there is a relation imposed by the courts, between parties, to prevent unjust enrichment of one to the detriment of the other.[7] The funda-

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[4] Bromley vs. Cleveland, C., C. & St. L. Ry. Company, 103 Wisconsin 562.

[5] Logan vs. Logan, 138 Texas 40.

[6] Tretheway vs. Tretheway, 16 California (2d) 133.

[7] Restatement of Restitution, Chap. 9.

mental difference between such different [56] concepts and the sanctions attendance thereon cause a wide divergence of results.

> "An attempt to define a trust in such a way as to include constructive trusts as well as express trusts is futile, since a single definition which would include such distinct ideas would be so general as to be useless."[8]

These basic concepts are then entirely distinct. The failure of the courts, on occasion, to recognize this distinction of the two concepts, called by the general name "trust", leads to confusion. Generally speaking, the courts will compel one who obtains land, personal property or money from another by means of fraud, duress or undue influence, to hold the property as though he were a trustee of an express trust.[9] In other words, by analogy, the courts reflect many incidents of an express trust in reasoning about this creation, to prevent unjust enrichment.

While express trusts are fiduciary relationships, a constructive trust need not have its origin in such a bond. But the courts impose a constructive trust upon money or property obtained through breach of the obligations by one who takes advantage of the opportunities laid open in a fiduciary or confidential relationship.[10] There the duty is plain, and the breach is usually in violation of good ethics as

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[8] Restatement of Restitution, page 641.

[9] Scott on Trusts, Vol. III, Sec. 468.

[10] Scott on Trusts, Vol. III, Sec. 468.

well as law. Thus, there is imposed the constructive trust, or the trust ex maleficio. There are two important differences between the incidents imposed by the court as a result of the finding of such a breach of duty involving transfer of property, and those applied [57] to an express trust. In the first place, there is no presumption of innocence or fair dealing because the imposition of a constructive trust presupposes a finding of bad faith and fraud. In the second place, the duty to restore all the avails of breach of faith requires a more flexible concept than the res which canalize the obligation of express trusts.

Turning to the situation in the instant case, we find that the high duty of Brown, in his confidential capacity as director-officer and trusted employee of the bank, was well defined. He was a fiduciary at all times. As a director he was bound by oath to diligently and honestly administer the affairs of the bank and was bound by oath not to violate himself or permit violations of the federal law relating to a national bank.[11] As an executive officer of the bank, he could not borrow or otherwise become indebted to it, or receive credit except under extremely limited conditions of which he was required ot make a written report.[12] If he had known of any embezzlements or thefts from the bank, he would have been required to give the bank notice thereof in order to protect its interests. If he had

[11] 12 USCA Sec 73.

[12] 12 USCA Sec 375A.

known of any customer of the bank who had embezzled money therefrom or who was indebted thereto, and who had also placed money on deposit, if the facts were unknown to other agents of the bank, he would have been required to report it in order that the bank could protect itself by the exercise of the right of set-off or by other means within its power. [58]

There was a breach of this duty owed by Brown to the bank, and a wilful abuse of the confidence and trust placed in him. He embezzled and misappropriated money and other assets of the bank in a sum of over $416,000.00. His realization of the criminal phases and consequences of his acts[13] and his moral and ethical responsibility therefor, caused him to take his own life.

The evidence indicates that large sums of money were taken directly from the bank. When notes evidencing loans made by the bank were paid, he kept the money. When deposits were made, he also took the money. He concealed all of these transactions from the other officers of the bank and the bank examiners, by a series of false entries of debits and credits on the books; by abstracting individual ledger sheets of customers from the files; by leaving notes, which had been paid, in the files of the bank as though they were outstanding; and by noting deposits which never became part of the assets of the bank, on the books of the depositors. Specifically, he violated his duty by stealing the

[13] 12 USCA Sec. 952.

cash of the bank; by failure to report the false entries; and by failure to notify the bank, its officers or agents, that he was in any manner indebted thereto.

The acts of Brown reveal a gross and flagrant breach of confidence imposed upon him by the bank. To this were attached the subtle tendrils which, because of the public nature of such an institution, pervaded the entire social structure of the community. He had taken an oath to guard the funds of the bank. By virtue of his position, he was enabled to carry out his unlawful enterprises. Finally, he prevented an accounting and escaped responsibility [59] for his violations of the trust and confidence reposed in him by killing himself when assured that all would be soon discovered. The moralities required that such conduct should not pass unpunished and that no one should receive, through the embezzler, the fruits of his unlawful peculations. However, extreme care must be taken in the examination of the applicable doctrines lest we be swayed to a moral end, despite the long established rules for the control of conduct in such tangled situations. Hard cases make bad law.

It is, however, established that there was a confidential relationship and a breach thereof. But according to the definition of a constructive trust, property must pass into the hands of the persons upon whom the courts impose it, or by his machinations, into the hands of third parties in order to lay a basis for recovery. There is no doubt that upon the discovery that the funds had been stolen,

the bank could have recovered from Brown in some of the forms of assumpsit or debt, but under the doctrines of restitution it could not recover specific property from him, or from a third party, unless it could be proven that the funds so abstracted from the bank were included therein, or were part of the purchase price thereof. Therefore, unless the stolen funds could be directly traced into specific articles of property, or into life insurance premiums, there could be no recovery by the bank of the articles or proceeds of the policies, notwithstanding the immoral and illegal operations of Brown and the great loss caused to the bank thereby.

But the ministers of the law are not confined to [60] one foundation for a constructive trust. They may follow fraud in all its protean forms. Once having established that the acts of Brown were in violation of his duty as a fiduciary, that quality is grasped firmly so that none of the benefits of recurring identity escape. "No man can take advantage of his own wrong." No one is held more strictly to the observance of this axiom than one whose fiduciary character is established. Therefore, before attempting to trace directly the funds actually taken by Brown, consideration should be given to the other duties which he violated and the consequences thereof.

His duty required him to disclose the fact of his indebtedness to the bank and to actually exercise the right of set-off for the bank as to any moneys which he might deposit therein irrespective of the

source.[14] His duty to the bank, likewise, required him to disclose the fact of his indebtedness and to accept no payments as salary or interests from the bank without full disclosure. He was, therefore, required, in view of all his knowledge of the facts, to apply all the salary payments to the liquidation of his indebtedness.

In Phillips vs. Chase, 203 Massachusetts 556, the defendant fraudulently procured the adoption, by his wife, of his own son by a former marriage in order to secure his wife's property for his son, thinking that if his son got the property the defendant would benefit thereby. After the death of both wife and son, the decree of [61] adoption was set aside in order to prevent the defendant from thus obtaining property unjustly. The court says:

"It was established by the answers given by the jury on the issues tried by them that the adoption of his son Woodruff was procured by a gross fraud practiced by Dr. Chase upon his wife and upon the court.

"The law will not allow a man to profit by his own wrong doing. Adopting and adapting the words of Mr. Justice Field in New York Mutual Life Ins. Co. vs. Armstrong, 117 U. S. 591, 600, 6 Sup. Ct. 877, 881, 29 L.Ed. 997, 'it would be a reproach to the jurisprudence of the country' if that were not so.

"It is settled that the English common law is not

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[14] See Atherton vs. Anderson, 99 F. (2d) 883; Live Stock State Bank vs. First National Bank of Fairfield, Idaho, 300 Fed. 945.

open to that reproach. It has been twice laid down in Great Britain, once by Lord King in Bovey v. Smith, 1 Vern. 60, and once by Lord Redesdale in Kennedy v. Daly, 1 Sch. & Lef. 355, 379, that one who obtains property by a breach of trust and afterwards buys it from a bona fide purchaser for value does not get a good title to it although every one else in the world buying under those circumstances would get the title of the bona fide purchaser for value. And that has been decided in New York (Clark v. McNeal, 114 N. Y. 287, 21 N. E. 405, 11 Am. St. Rept. 638) and in Maine (Bailey v. Bailey, 61 Me. 361).

Where a fiduciary is guilty of a breach of duty and acquires property or money by reason of his tortious conduct, the person to whom the duty is owing may have restitution of the benefit thus obtained, either from the faithless fiduciary or from the person who has obtained the property from him, except the latter be a bona fide purchaser for value.[15]

Even if this principle were not available, still constructive trusts are imposed where a person is entitled to recover money which he has paid to another on account of the terms of a contract which he supposed to exist and which, to the knowledge of the other party, did not actually [62] exist, whether

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[15] Restatement of Restitution, Sec. 138, 190, 201; Restatement of Agency, Secs. 314, 403, 404 and 407; Restatement of Trusts, Secs. 197 and 226.

failure or consideration or some other defect was responsible for the condition.[16]

Brown paid practically all premiums on the policies in question out of accounts maintained at the same bank from which the tremendous sums above mentioned were stolen. If Brown had taken the money which he stole from the bank, and placed it in cattle, there would have been no question of the right of the bank to recover the cattle against anyone, except a holder for value in good faith. If Brown had not deposited money in the bank, but had, on the records thereof, set up entries showing that he had an account there when in truth he had none, and his checks were cashed which paid for cattle, it could not be held that the money so paid, was his money, and therefore the bank, under like circumstances, could recover.

But it is said that when Brown actually deposited money, it remained his until the bank actually exercised its right of set-off. The bank would, of course, have exercised this right if the defalcations were known to it at the time. This argument simply means that where a thief is successful in concealing his abstractions, the ill gotten gains will be protected, whereas, if the abstractions have been timely discovered, the losses could have been re-

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[16] Restatement of Restitution, Secs. 15 and 16. "Payments as a result of fraud or misrepresentation are within the rule stated in this section. In such cases the payor is entitled to restitution although his mistake was not basic. The rules specially applicable are stated in Secs. 8, 9 and 28."

couped. Besides, as above noted, the failure to notify the bank or make the set-off was itself a fraud.

If Brown, as an officer, had set up a fictitious set of entries purporting to show that he had an account in the bank where he had made no deposits, and had paid for cattle with the proceeds, the result would be the same. If Brown had abstracted moneys from a till in the bank and [63] it had been proven that he deposited these moneys in a valid bank account in his own name, and had issued a check thereon in payment for cattle, and there were no more moneys in the account than those stolen, the bank could still recover the cattle. Where Brown, by virtue of his position as employee, director and officer, surreptitiously embezzled funds from the bank and thereafter deposited funds in the bank, the bank could not become indebted to him by virtue of such a deposit, until he had repaid all he had unlawfully abstracted. If then, in ignorance of the true situation, through his fraud, the bank honored checks on a suppositious account, it paid out its own money and not that of Brown. It was deluded into believing it paid the money of Brown, but the situation was no different than if Brown had made no deposits. Therefore, if Brown had bought personal property with this money of the bank, the latter could have recovered.

The options which one whose money is stolen has against the defaulter are clearly developed in the scholarly opinion of Judge Learned Hand in Pri-

meau vs. Granfield, 148 Fed. 480[17] which illuminates the field. A learned review of the subject is made by Judge St. Sure, writing for the Circuit Court of Appeals of the Ninth Circuit, in Republic Supply Co. of California vs. Richfield Oil Co., 79 F.(2d) 375, where like reasoning is followed.

The results of this reasoning were squarely stated by the court in McConnell vs. Henochsberg, 11 Tennessee Appellate 176, in an able and well worked out opinion upon facts almost identical with those in the case at bar. [64] Criticism is made of the application of that case to the situation here because of the fact that the court says "it is evident that several thousand dollars of this stolen money was used by Henochsberg and did actually pass through his bank accounts." The same finding could be made in the case at bar. However, this court does not place the decision here upon that basis, but upon the broad ground upon which the Tennessee court may also have relied, that the fiduciary who obtains property by breach of his obligations of confidence cannot equitably retain it.

American National Bank vs. King, 158 Oklahoma 278, deserves but slight consideration upon this issue. The court there held that a finding by the lower court that the premiums upon life insurance policies of its defaulting president were not paid by moneys of the bank, was not against a fair preponderance of the evidence. The principles of law

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[17] Reversed on other grounds. Primeau vs. Granfield, 2 Cir. 193 Fed. 911.

relating to this feature were not discussed. The scholarly treatment of the remedy of restitution in like circumstance in the Tennesses case, is not mentioned, nor is that case cited. The court apparently entertained an emotional dislike for the doctrine of recovery of the proceeds of an aleatory contract and upon this feeling the case is founded.

The result is, that the Tennessee case is the only reasoned case upon this particular set of circumstances. Inasmuch as this decision squares with correct doctrine, as indicated by the previous discussion, it will be followed upon this point. All the money paid out upon checks issued by Brown against his paper accounts, belonged to the bank. By his fraud and false representations, he had prevented the bank from withholding his salary payments and from exercising [65] its right of set-off. Whether the payments were made for salary, or in honoring his checks, the bank made them by mistake of fact, pursuant to obligations which it believed it owed to Brown.

There is an alternative and equally convincing theory upon which the same conclusion may be founded. A review of the evidence which, although indirect, is convincing, makes clear that since Brown had no other sources of income initially, except his salary and the embezzled funds, that the bulk of the moneys which he deposited was from these springs. None of the stolen money can be traced directly thereto, but any fact may be proven by direct or indirect evidence. This leads to a consideration of an analogous line of cases where the defaulter

is not an employee of a bank but deposits the stolen funds therein. It will be apparent that the doctrine just held controlling would not apply under such circumstances. However, the courts reach the same result on the ground that once fraud has been proven, the doctrine of comingling of funds applies[18] and the constructive trustee will be liable if he does not segregate the fund. Since there is no presumption of innocence attaching, his death will not protect the beneficiaries.[19]

In the case of Truelsch vs. Northwestern Mutual Life Insurance Co.[20] there is an illustrative example of a situation where the defaulter was not an employee of the bank. [66] where he deposited his funds. The court there finds from indirect evidence that the money stolen was deposited in the bank and paid out by check upon the premium. The court disregards the question as to whether salary paid belonged to the employer, but treats the whole bank account, which may have contained some salary payments, as a comingled fund. The fact that the defaulter was dead did not prevent the application of this doctrine.

Thus it is, that all the moneys paid out by the

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[18] Massachusetts Bonding & Insurance Co. vs. Josselyn. 224 Michigan 159; Moseley vs. Fikes, 133 Texas 386; Long vs. Earle, 277 Michigan 505; Meyers vs. Baylor University, 6 S.W. (2d) 393, 394.

[19] See Meyers vs. Baylor University, supra.

[20] Truelsch vs. Northwestern Mutual Life Insurance Co., 186 Wisconsin 239.

bank belong to it. Therefore, if Brown had bought cattle with the proceeds, the bank could have obtained this property in specie from anyone except a bona fide purchaser for value. It is objected that while such property could have been recovered, it is a grave injustice to permit the recovery of the proceeds of an aleatory contract such as an insurance policy on the defaulter's life. However that may be, the question is settled in the State of Oregon by the decision in Jansen vs. Tyler, 151 Oregon 268, wherein is cited the able opinion of the elder Judge Sanborn reported as Vorlander vs. Keyes, 1 F. (2d) 67.

The Vorlander opinion just cited is repudiated by the Oklahoma court in American National Bank vs. King, supra. The rationale of the last mentioned opinion is that the wife and minor children of a defaulter have an investment in his life which should be given to them despite his wrongdoing.

In this case, the full amount of the insurance will not cover the peculations. There is a strong public policy against permitting a wrongdoer from thus taking advantage of his own wrong in order to build up an estate which the law will render secure for his successors as against the [67] person from whom the money was stolen.

The status of the wife or mother who is innocent of fraud and who is beneficiary of these "solemn contracts of insurance" according to plaintiff's brief, is well stated in the Vorlander case, 1 F.(2d) 67, 69-70:

"(4) Nor may another, in this case the wife, now the widow of the trustee ex maleficio, though herself innocent of the fraud, who has paid no consideration for the property purchased with the misappropriated funds or for their fruits, hold any of them against the cestui que trust, the owner thereof. A third person, unless he or she has in good faith acquired for value without notice a subsequent interest, seeking any benefit resulting from the misappropriation becomes a particeps criminis however innocent of the fraud in the beginning. Story's Equity Jurisprudence (14th Ed.) Sec. 1666, 1667, 1668, 1669, 1670, Perry on Trusts, Sec. 127, 166."

The bank would have, therefore, been entitled to recover all of the proceeds of the insurance which was paid for by checks drawn on the fictitious accounts of Brown therein. However, as to the payment of the premium made December 28, 1940, on policy No. 12748022, there is no evidence from what source this was made. Recovery could not then be had by the bank of the proceeds thereof on the theory that the payment was traced into a comingled fund. On the other hand, to allow recovery upon the theory that the funds were comingled when placed into the insurance policies, would violate the principles laid down in the Jansen case above cited.

Finally, it is objected that no matter what were the rights of the bank, the intervenor could not succeed to them because, having assumed the deposit liability of the bank the obligation was thus satisfied. It is assumed that this objection can be based

upon American Surety Company vs. Bank of California, decided by this court in an opinion reported in 44 F. Supp. 81, and affirmed by the Circuit Court [68] of Appeals for the Ninth Circuit in an opinion reported in 133 F.(2d) 160. The confusion of plaintiff seems to arise from the fact that no account is taken of the specific contract made in these two cases. The American Surety Company had there become responsible for the fidelity of the embezzler and when the proceeds of the wrongdoing were replaced, the obligation was completely satisfied. Here, the Federal Deposit Insurance Corporation was under duty simply to replace the assets, no matter how the loss occurred. It has no specific responsibility for the fidelity of Brown. When it carried out the obligation to replace the assets lost, it acquired the right of the bank against the wrongdoer. Both these cases are ruled by Oregon decisions. The American Surety Company case is governed by the opinion in the case of American Central Insurance Company vs. Weller, 106 Oregon 494. This case, on the other hand, is governed by the Jansen case above cited.

Findings and judgment may be prepared in accordance herewith.

[Endorsed]: Filed July 12, 1944. [69]

[Title of District Court and Cause.]

FINDINGS OF FACT AND CONCLUSIONS OF LAW

The above entitled action came on for trial, the plaintiff appearing in person and by Mr. James Dezendorf of counsel, and the defendant, the Federal Deposit Insurance Corporation appearing by Mr. Robert F. Maguire of its counsel, and the defendant New York Life Insurance Company having heretofore inter-pleaded and by order of court heretofore made, having deposited in the registry of this court the sum of $20,582.00, being the proceeds of the insurance policies on the life of Edward N. Brown which are the subject of this action, a pretrial conference having heretofore been had and as a result thereof the court having made and entered its pretrail order based thereon; the respective parties, Ruby M. Brown and Federal Deposit Insurance Corporation having respectively offered evidence upon the issues of this case as made up by the pleadings and the pre-trial order, and both parties having rested and having submitted the case to the court for decision and the court being fully advised in the premises hereby makes its,

FINDINGS OF FACT

I.

Plaintiff is a resident of the state of Oregon, the defendant, New York Life Insurance Company is a corporation organized and existing under and by virtue of the laws of the state of New York, and is

licensed to engage in the life insurance business in the state of Oregon. The Harney County National Bank of Burns, Burns, Oregon, is a national banking association organized and existing under the laws of the United States. The defendant, Federal Deposit Insurance Corporation is a corporation organized and existing by virtue of the laws of the United States.

II.

The amount in controversy exceeds, exclusive of interest and costs, [70] the sum of $3,000.00.

III.

On November 27, 1935 the New York Life Insurance Company in consideration of the payment of the premiums therein specified, issued its policies of life insurance on the life of Edward N. Brown, in which policies the plaintiff Ruby M. Brown was made his beneficiary. Said policies were numbered #12748022 and #12748023 respectively, and by the terms of each of them the insurance company agreed to pay to Ruby M. Brown the sum of $10,000.00 upon the receipt of proof of the death of Edward N. Brown.

IV.

The defendant, Edward N. Brown, died by his own hand on or about August 6, 1942, and due proof of his death was thereafter furnished to and received by the insurance company, and by reason thereof there became due and payable under said policies the total sum of $20,582.00, being $10,327.00

on policy #12748022 and the sum of $10,255.00 on policy #12748023.

V.

On or about August 18, 1942, the insurance company issued, and on August 21, 1942, delivered to plaintiff two checks in the following amounts respectively $10,327.00 and $10,255.00, whereby it directed the United States National Bank of Portland, (Oregon) to pay to the order of the plaintiff the respective amounts thereon.

VI.

The plaintiff presented each of said checks for payment to said bank on September 4, 1942, but the bank refused to pay said checks and advised her that the insurance company had previously countermanded payment thereof.

VII.

Prior to September 4, 1942 when said checks were presented for payment the Federal Deposit Insurance Corporation notified the insurance company that it had information indicating that the money used in payment of premiums on the above entitled policies were funds of the Harney County National Bank of Burns, Burns, Oregon, and the Federal Deposit Insurance Corporation notified the insurance company that it would and it did claim the right to receive the proceeds of said policies of insurance; whereupon the insurance company stopped payment on the two checks above mentioned.

VIII.

The New York Life Insurance Company does not have or claim to have [71] any right or interest in the proceeds of said policies, and has tendered into the registry of this court the sum of $20,582.00, being the whole amount of said proceeds, and by order of this court made and entered was allowed the sum of $416.06 as and for its costs and reasonble attorney's fees, which said last named sum has been paid from the registry of said court to said insurance company.

XI.

There remains in the registry of this court the sum of $20,165.94, which is the sum in controversy between the plaintiff and the defendant Federal Deposit Insurance Corporation.

X.

Edward N. Brown paid the premiums due on said policies of insurance by checks which were received at the Boise, Idaho office of the insurance company. The amounts of said checks and the date when the same were received by the insurance company and the premium payments made thereby upon the respective policies and the banks upon which they were drawn are as follows:

Policy No.	Date	Amount	Bank on which Drawn
#12748022	11/29/35	$297.20	Harney County National Bank of Burns, Burns, Oregon.
	10/21/36	297.20	" " " "
	9/11/37	297.20	" " " "
	12/ 2/38	297.20	" " " "
	10/21/39	297.20	" " " "
	12/28/40	297.20	Source of payment unknown.

Policy No.	Date	Amount	Bank on which Drawn
#12748023	2/ 6/37	297.20	Harney County National Bank of Burns, Burns, Oregon.
	1/11/37	297.20	" " " "
	11/ 3/37	297.20	" " " "
	12/31/38	297.20	" " " "
	10/21/40	310.40	" " " "

XI.

Each of the checks drawn by Edward N. Brown on the Harney County National Bank were honored and paid by said bank from its funds.

XII.

At the time each of said checks were presented to and paid by Harney County National Bank Edward N. Brown had an apparent credit on the books of the bank in the account on which said checks were drawn of more than the amount of the checks. Said apparent balances on the dates hereinafter [972] set forth, which are the dates when the respective checks were presented to and paid by said bank were as follows:

Policy No.	Date	Account	Amount
#12748022	12/ 2/35	Personal account	$ 349.56
	10/23/36	Special account	2,045.00
	9/14/37	Personal account	533.49
	12/ 5/38	Personal account	313.06
	10/24/39	Special account	366.78
#12748023	2/10/36	Special account	661.20
	1/13/37	Special account	1,872.20
	11/ 8/37	Personal account	544.44
	1/ 3/38	Personal account	309.81
	10/24/40	Personal account	3,191.35

These apparent credit balances consisted of the then remaining balances of actual deposits of cash

or checks made payable to Edward Brown or his order, or both.

XIII.

Edward N. Brown was continuously an employee of the Harney County National Bank of Burns, Burns, Oregon, from the year 1927 to the date of his death, and he occupied the following positions:

A. From 1927 to January 12, 1932 as Teller and in other capacities;

B. From January 12, 1932 to January 11, 1938 as Assistant Cashier;

C. From January 7, 1936 to August 6, 1942 as Director;

D. From January 11, 1938 to August 6, 1942 as Vice President.

XIV.

During the period of Brown's employment, and while he was an officer and director of said bank he embezzled and misappropriated approximately $416,777.73 of its funds and properties.

XV.

From manipulations of customers' accounts alone Edward N. Brown's embezzlements and appropriations were as follows during each of the years hereinafter set forth; [73]

	Embezzlements
Prior to 1935	$ 5,869.29
In 1935	12,893.21
In 1936	3,031.52
In 1937	17,996.84
In 1938	40,982.14
In 1939	93,203.44
In 1940	39,780.33

	Embezzlements
In 1941	– 489.99*
In 1942	10,319.61
Embezzlements from customers' accounts alone	$223,586.39

* Embezzlements $93,272.41, but there were compensatory bookkeeping entries in connection with the above embezzlements of $93,762.40.

These embezzlements and misappropriations from customers' accounts were accomplished by means of false entries, withheld deposits made by depositors, withheld payments made by borrowers, and by unauthorized or unlawful withdrawals from credits and accounts of depositors of the bank.

XVI.

Of the embezzlements and misappropriations described in Findings XIV and XV no part was ever repaid or otherwise made good to the bank. The directors of the bank were not aware of any wrongful acts, embezzlements or misappropriations and defalcations of Edward N. Brown, and of any breaches of trust or duty on his part toward the bank; and in authorizing and fixing his salary, and in paying the same and in authorizing him to draw and receive the same the directors acted without knowledge of his peculations and breaches of trust and duty.

XVII.

At all times concerned in this action the accounts of depositors of the Harney County National Bank of Burns, Oregon were insured by the Federal De-

posit Insurance Corporation in accordance with the provisions of the laws of the United States, and particularly of Title 12 U.S.C.A. Section 264.

XVIII.

On or about August 29, 1942, Federal Deposit Insurance Corporation entered into an agreement with the Harney County National Bank to acquire, and did acquire, and ever since said date has been and is the owner of the assets of said bank including all contracts, rights, claims, demands and choses of action and causes whatsoever pending, causes of action and judgment, whether known or unknown, which Harney County National Bank owned, held or had or owns or has against any person whomsoever including among other things all those which said bank had or has against any of its officers, [74] directors, or employees, or their sureties arising out of any action of any such persons in respect to the bank or its property, or arising out of the non-performance or manner of performance of their duties, together with any claims against any person for money or property of the bank or for damages that the bank may have had or owned.

XIX.

At all times when Harney County National Bank honored and paid the several checks drawn by Edward N. Brown against it in payment of insurance premiums on the policies of insurance involved in this case, Edward N. Brown was indebted to the bank by reason of his misappropriations, embezzle-

ments and defalcations in amounts vastly in excess of any credits to his various accounts by reason of deposits or otherwise.

XX.

All premiums paid on policy #12748022, with the exception of the premium of $297.20 paid December 28, 1940 were paid by funds of and belonging to Harney County National Bank of Burns, Burns, Oregon, and no part of the same were paid from funds or credits belonging to Edward N. Brown.

XXI.

That all premiums paid on policy No. 12748023 were paid with funds of and belonging to Harney County National Bank of Burns, Burns, Oregon, and no part of the same were paid from funds or credits belonging to Edward N. Brown.

XXII.

All premiums on policy #12748022 were paid from funds and property of the Harney County National Bank of Burns, Burns, Oregon, except one premium of $297.20 paid to the insurance company on December 28, 1940, the source of which latter payment was not proved nor traced by either plaintiff or defendant.

From the foregoing Findings of Fact the court has reached and does make the following,—

CONCLUSIONS OF LAW

I.

That all premiums paid on policy #12748022, with the exception of the premium payment of $297.20

paid December 28, 1940, were paid from funds and property of Harney County National Bank of Burns, Burns, Oregon, [75] and were not paid by or with funds or credits belonging to Edward N. Brown.

II.

That all premiums paid on policy #12748023 were paid from funds and property of Harney County National Bank of Burns, Burns, Oregon, and no part of the same were paid with any credits, funds or property of Edward N. Brown.

III.

All premiums on policy #12748022 were paid from funds and property of the Harney County National Bank of Burns, Burns, Oregon except one premium of $297.20 paid to the insurance company on December 28, 1940, the source of which latter payment was not proved nor traced by either plaintiff or defendant.

IV.

That by reason of the wrongful use by Edward N. Brown of property, assets and funds of Harney County National Bank of Burns, Burns, Oregon, in paying the premiums on policy No. 12748023 a constructive trust arose in favor of Harney County National Bank of Burns, Burns, Oregon, and in favor of its assignee Federal Deposit Insurance Corporation, and for the full amount of the proceeds of said policy.

V.

That by reason of the wrongful and unlawful use by Edward N. Brown of the assets and property of

Harney County National Bank of Burns, Burns, Oregon, in paying all the premiums on Policy No. 12748022, with the exception of the premium of $297.20 paid on December 28, 1940, a constructive trust arose in favor of the bank, and in favor of defendant Federal Deposit Insurance Corporation as assignee of said bank for that proportion of the proceeds of said policy that the amount of the premiums paid from the bank's funds bears to the total amount of the premiums paid on said policy.

VI.

That Federal Deposit Insurance Corporation, as assignee of Harney County National Bank of Burns, Burns, Oregon, is the owner of and entitled to judgment for the whole amount of the proceeds of policy No. 12748023, namely $10,255.00, less one-half the amount of the allowance of $416.06 paid to New York Life Insurance Company for costs and attorneys' fees herein to-wit, $10,046.97, and for an order to the clerk of this court [76] directing him to pay said sum to Federal Deposit Insurance Corporation from the funds in the registry of this court.

VII.

That Federal Deposit Insurance Corporation, as assignee of Harney County National Bank of Burns, Burns, Oregon, is the owner of and entitled to judgment for five-sixths of the amount of the proceeds of Policy No. 12748022, namely, five-sixth of $10,327.00, less one-half of the amount of the allowance of $416.06 paid to New York Life Insurance Company for costs and attorneys' fees herein, to-wit, five-sixth of $10,118.97, or $8,432.45, and for an

order to the clerk of this court directing him to pay said sum to Federal Deposit Insurance Corporation from the funds of the registry of this court.

VIII.

That defendant Federal Deposit Insurance Corporation is entitled to have and recover said costs and disbursements from the balance of funds deposited in the registry of this court by New York Life Insurance Company, and for an order directed to the clerk of this court to pay the same to said corporation from the balance of the proceeds of said policies in his hands so far as the same may be sufficient to satisfy said costs and disbursements.

X.

That plaintiff Ruby M. Brown is the owner of one-sixth of the proceeds of Policy No. 12748022, namely, one-sixth of $10,327.00, less one-half of the amount of the allowances of $416.06 paid to New York Life Insurance Company for costs and disbursements, to-wit, one-sixth of $10,118.97, or $1,-686.49, and less the further amount of such costs and disbursements of Federal Deposit Insurance Corporation as may be allowed and taxed herein, and for an order directing the clerk of this court to pay the same to the plaintiff from the amount of the funds deposited by New Your Life Insurance Company to the registry of this court.

Done in open court this 20th day of November, 1944.

/s/ JAMES ALGER FEE
Judge

State of Oregon,
County of Multnomah—ss.

Service of the foregoing Findings of Fact and Conclusions of Law by copy, as prescribed by law is hereby admitted, at Portland, Oregon this .... day of June, 1944.

/s/ JAMES C. DEZENDORF
Attorney for Plaintiff

[Endorsed]: Filed Nov. 20, 1944. [77]

In the District Court of the United States
for the District of Oregon

Civil No. 1412

RUBY M. BROWN,

Plaintiff,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Defendant,

FEDERAL DEPOSIT INSURANCE CORPORATION,

Inter-pleaded Defendant.

JUDGMENT ORDER

The court having heretofore and made and entered its Findings of Facts and Conclusions of law herein that the defendant, Federal Deposit Insurance Corporation, having moved the court for an order of judgment and decree based on said findings

and conclusions, the court being advised of the premises,—

It Is Hereby Ordered, Adjudged And Decreed as follows:

1. That the Federal Deposit Insurance Corporation have and recover all of the proceeds of policy No. 12748023 being the sum of $10,255.00 less one-half the amount of $416.06 costs and disbursements allowed and paid to the New York Life Insurance Company, to-wit the sum of $10,046.97.

2. That the Federal Deposit Insurance Corporation have and recover a sum equal to five-sixths of the proceeds of policy No. 12748022, being five-sixths of the sum of $10,327.00 less one-half of the sum of $416.06 paid to the New York Life Insurance Company for costs and disbursements, to-wit the sum of $8432.45, being five-sixths of $10,118.97.

3. That the Federal Deposit Insurance Corporation have and recover from the plaintiff, Ruby M. Brown, its costs and disbursements herein incurred and taxed at .... dollars.

4. That the clerk of this court be and he is hereby ordered and directed to pay to the Federal Deposit Insurance Corporation from the registry of this court the sum of $10,046.97, the further sum of $8432.45 and the amount of defendant Federal Deposit Insurance Corporation's costs and disbursements taxed at .... dollars.

5. The plaintiff have and recover the balance of said funds paid in by the New York Life Insurance Company after the payments therefrom of the sums

ordered and adjudged to be paid to the Federal Deposit Insurance Corporation. [78]

Done in open court this 20th day of November, 1944.

/s/ JAMES ALGER FEE
Judge

[Endorsed]: Filed Nov. 20, 1944. [79]

[Title of District Court and Cause.]

MOTION TO AMEND PRE-TRIAL ORDER AND FOR A NEW TRIAL.

Comes now plaintiff and moves the court for an order (1) setting aside the findings of fact, conclusions of law and judgment heretofore entered herein on November 20, 1944, (2) amending the pretrial order so as to permit Plaintiff to deny Paragraph B, on Page 11-a thereof, and (3) directing a trial on the issue raised by Paragraph B and Plaintiff's denial thereof.

This motion is based upon the Affidavit of James C. Dezendorf, one of Plaintiff's attorneys, which is attached hereto and upon the following grounds:

(a) In Paragraph B, on Page 11-a of the Pretrial Order, there is set forth the shortage claimed by F.D.I.C. as against Edward N. Brown in each year from 1935 through 1942. The facts, as claimed by F.D.I.C. in this paragraph, were not conceded by Plaintiff but it was admitted that F.D.I.C. could produce evidence to support the facts as alleged.

(b) At the time of the pretrial and of the settlement of the Pretrial Order, Plaintiff had not made any audit of the records of the Harney County National Bank and her financial condition was such that no complete audit could have been made.

(c) In connection with the suit brought by F.D.I.C. against the Edward N. Brown Estate, pending in this court, Civil No. 2329, an audit has been made of such records of the Harney County National Bank of Burns, Oregon, as have been produced by F.D.I.C., (although it has been impossible to make a complete audit because of the absence of requisite information and records which have been requested) and, after the decision herein was announced, on June 12, 1944, it was discovered by the auditor for the Estate of Edward N. Brown, deceased, and was [80] reported to Plaintiff herein and it now appears probable that Edward N. Brown was not indebted to the Bank by reason of alleged embezzlements and misappropriations during the years 1935, 1936, 1937, 1938 and perhaps in the subsequent years, except 1942.

(d) If, in fact, Edward N. Brown was not indebted to the Bank during the years 1935, 1936, 1937, 1938 and in the subsequent years, except 1942, under the decision announced herein Plaintiff would receive the benefit of all premium payments prior to 1942 and the final result would be entirely different.

(e) In addition, the incomplete audit which has been made indicates that the Bank's records actually reflect many of the deposits and withdrawals in depositors' accounts which are claimed by F.D.I.C. to

have been withheld, so that, in fact, they actually were received and went through the Bank's records.

/s/ HAMPSON, KOERNER,
YOUNG & SWETT
JAMES C. DEZENDORF
Attorneys for Plaintiff,

[Endorsed]: Filed Nov. 28, 1944. [81]

[Title of District Court and Cause.]

AFFIDAVIT OF JAMES C. DEZENDORF

State of Oregon
County of Multnomah—ss.

I, James C. Dezendorf, being first duly sworn, depose and say that I am one of the attorneys for Plaintiff herein; that at the time of the pretrial conference herein and at the time of the settlement of the Pretrial Order Plaintiff had not made an audit of the records of the Harney County National Bank of Burns, Oregon, for the purpose of verifying the facts as claimed by F.D.I.C. with respect to the alleged shortage of Edward N. Brown during the years 1935 to 1942. In connection with the action by F.D.I.C. against the Edward N. Brown Estate an audit has been made of such records of the Harney County National Bank of Burns, Oregon, as have been produced by F.D.I.C. and, after the decision was announced herein on June 12, 1942, the auditor reported to me that from the audit which he had made it appeared probable that Edward N. Brown was not, in fact, indebted to

the Bank by reason of alleged embezzlements and misappropriations during the years 1935, 1936, 1937, 1938 and perhaps in the subsequent years, except 1942. The auditor for the Estate also reported to me that his examination of the Bank's records disclosed that they actually reflect many of the deposits and withdrawals in depositors' accounts which F.D.I.C. claimed were withheld, so that the funds represented by the so-called withheld items were actually received by and went through the records of the Bank.

That if the auditor's statements, as above set forth, are true the result herein, upon the basis of the court's opinion, will be entirely different and plaintiff will receive the benefit of all premium payments prior to 1942.

/s/ JAMES C. DEZENDORF [82]

Subscribed and sworn to before me this 28th day of November, 1944.

[Seal] /s/ DOROTHY THAIN
Notary Public for Oregon

My commission expires Dec. 20, 1944.

State of Oregon,
County of Multnomah—ss.

Service of the foregoing Motion to Amend Pretrial Order and For a New Trial by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 28th day of November, 1944.

/s/ MAGUIRE, SHIELDS &
MORRISON.
Of Attorneys for F.D.I.C.

[83]

[Title of District Court and Cause.]

AFFIDAVIT IN OPPOSITION TO PLAINTIFF'S MOTION TO AMEND PRETRIAL ORDER AND FOR A NEW TRIAL

Comes now Federal Deposit Insurance Corporation and files its objections to motion made by the plaintiff for an order setting aside the findings of fact and conclusions of law judgment heretofore entered on November 20, 1944, and to amend the pretrial order to permit plaintiff to deny Paragraph B, on page 11-A thereof and for an order directing a trial on the issues raised by Paragraph B and plaintiff's denial thereof upon the following grounds and reasons:

1. That said motion is not timely;

2. That the affidavit supporting said motion is insufficient in law and fact and purely hearsay, not made by any person having any knowledge of the facts and that the plaintiff is estopped to have or receive the relief prayed for therein.

In support hereof the defendant Federal Deposit Insurance Corporation submits the affidavit of Robert F. Maguire, one of its attorneys, attached hereto.

/s/ MAGUIRE, SHIELDS & MORRISON

Attorneys for Federal Deposit Insurance Corporation

State of Oregon.
County of Multnomah—ss.

I, Robert F. Maguire, being first duly sworn on oath, depose and say that I am one of counsel for Federal Deposit Insurance Corporation in the case of Ruby M. Brown vs. New York Life Insurance Company and Federal Deposit Insurance Corporation. That at the time the said case came on for trial the Federal Deposit Insurance Corporation had in attendance on the trial its examiner Fossum, who had charge of the complete audit of the books, records and affairs of the Harney County National Bank and the duty of ascertaining the amounts and extent of the [84] misappropriations and defalcations of Edward N. Brown of the funds, assets and properties of that Bank. That Fossum was intimately familiar with the means and methods whereby the said Edward N. Brown accomplished the misappropriations and defalcations which made up the items and the amounts claimed by the Federal Deposit Insurance Corporation and was prepared to and would have testified in detail with regard to each of said items which make up the various sums set forth in Paragraph B, page 11-A at the pretrial order; that the audit examination of the books and records of the Bank and its affairs included examination and audit of passbooks, check stubs, and supporting data of the Bank's customers relating to their several respective transactions with the Bank as to which misappropriations and defalcations were alleged; that the defendant Federal Deposit Insurance Corporation was then prepared,

ready, able and willing to have offered detailed proof of each of said items, but plaintiff although not admitting the amount of said misappropriations and defalcations admitted that the Federal Deposit Insurance Corporation could produce evidence to substantiate the same.

At the request of the administrators of the estate of Edward N. Brown, deceased, and in connection with the action brought in this court by the Federal Deposit Insurance Corporation against said adminstrators the defendant Federal Deposit Insurance Corporation had transported to affiant's office in Portland, Oregon, the Bank's books and records which were so voluminous their weight was approximately one ton; that all these records were made available to the auditor of the administrator who spent several weeks in examining them.

That during the latter part of said auditor's examination he informed the affiant that he had discovered that in a number of instances deposits alleged to have been made by the customers which were the basis of claims of misappropriations by Edward N. Brown had been reflected in "The Savings Ledger" and further stated that while he did not doubt there was an explanation as to why misappropriation was claimed with respect to this he personally did not know the explanation and requested affiant to ascertain the facts relative thereto.

As an example he cited the case of F. Jeneskie. Affiant thereupon communicated with Federal Deposit Insurance Corporation and ascertained that

Mr. Fossum was then detailed to an investigation in one of the New England states and that as soon as he could be released therefrom and [85] returned to the general office of the corporation in Chicago, Illinois, where his records were available, he would make an analysis and that the result thereof would be communicated to affiant. Unfortunately, however, before Mr. Fossum could return to Chicago he was taken seriously ill and only within recent days has been able to resume work.

Affiant is informed by Federal Deposit Insurance Corporation and verily believes and alleges that the facts with regard to these instances where withheld deposits appear to have been credited to the so-called "Savings Ledger" are as follows:

That the so-called "Savings Ledger" is misnomer, that it is in fact merely a daily journal used solely for trial balance purposes; that it was the practice of the said Edward N. Brown in many instances to credit the amount of the deposit upon the depositor's passbook, to make entries thereof on the so-called "Savings Ledger", which was actually a daily savings journal, but not to make corresponding entries in the individual ledger sheets, that he would then withhold the deposit and convert it to his own use and reconcile the trial balance by means of debit memos which were destroyed when they had served their purposes of reconciliation of the trial balance with the actual balance; said debit memos were false and fictitious, and were used solely for the purpose of concealing his misappropriations and embezzlements; but that in each of

these instances no credits were passed into or entered upon the individual savings ledger of the customer.

That the entries made on the so-called "Savings Ledger" or daily savings journal cannot be reconciled with the individual depositor's ledger sheets due to the fact that where deposits were withheld by Brown no corresponding entries were made on the latter. That in the case of the Jeneskie account, the customer's passbook disclosed the proper entries, which were in a large part of these supported by cancelled checks issued to the depositor by the Hines Lumber Company; that in truth and in practice said Edward N. Brown misappropriated and embezzled each of the items making up the amounts set forth in the pretrial order referred to in the motion for new trial, and alleged by the defendant to have been misappropriated and embezzled by him, and the amounts thereof were at least as large as the amounts set forth in the pretrial order, and in the Exhibits offered by the Federal Deposit Insurance Corporation at the trial for each of the years, 1935, 1936, 1937, 1938, 1939, 1940, 1941 and 1942. [86]

/s/ ROBERT F. MAGUIRE

Subscribed and sworn to before me this 5th day of December, 1944.

[Seal] /s/ MARION HUGGINS
Notary Public for Oregon

My commission expires: 3-18-47.

State of Oregon,
County of Multnomah—ss.

Service of the foregoing Affidavit by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 5th day of December, 1944.

/s/ JAMES C. DEZENDORF
Attorney for plaintiff

[Endorsed]: Filed Dec. 5, 1944. [87]

[Title of District Court and Cause.]

ORDER DENYING PLAINTIFF'S MOTION FOR NEW TRIAL AND TO AMEND THE PRETRIAL ORDER

This matter having come on for hearing on January 8, 1945 upon plaintiff's motion for a new trial and to amend the pretrial order, and the plaintiff appearing by Mr. James C. Dezendorf of her counsel, and the defendant, Federal Deposit Insurance Corporation appearing by Robert F. Maguire of its counsel, and the court having heard counsel and being advised of the premises, and having in open court denied said motions and each of them—

It Is Hereby Ordered and Adjudged that plaintiff's motions for a new trial and to amend the pretrial order herein is hereby denied.

Done this 31st day of January, 1945 as of January 8, 1945, the latter being the date on which said motions were denied.

/s/ JAMES ALGER FEE
District Judge.

[Endorsed]: Filed Jan. 31, 1945. [88]

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the Plaintiff above named, Ruby M. Brown, hereby appeals to the Circuit Court of Appeals, for the Ninth Circuit, from (1) the Judgment Order entered in this action on November 20, 1944, and (2) the order denying Plaintiff's Motion to Amend Pretrial Order and for a New Trial entered in this action on Januray 8, 1945.

HAMPSON, KOERNER,
YOUNG & SWETT
Signed: JAMES C. DEZENDORF
Attorneys for Appellant,
Ruby M. Brown

State of Oregon,
County of Multnomah—ss.

Service of the foregoing Notice of Appeal by copy, as prescribed by law is hereby admitted, at Portland, Oregon, this 13th day February, 1945.

.....

Of Attorneys for Interpleaded Defendant.

[Endorsed]: Filed Feb. 13, 1945. [89]

DEFENDANT'S PRE-TRIAL EXHIBIT No. 34

Shortages by Years

Year	Restitutions	Omitted Credits and Improper Debits	Net Shortage
Prior to 1935	$ 1,112.01	$ 6,981.26	$ 5,869.25
1935	9,173.32	22,066.53	12,893.21
1936	24,283.76	27,315.28	3,031.52
1937	10,818.23	28,715.07	17,996.84
1938	7,521.58	48,503.72	40,982.14
1939	47,084.38	140,287.82	93,203.44
1940	56,879.87	96,660.20	39,780.33
1941	93,762.40	93,272.41	489.99
1942	33,002.87	43,322.48	10,319.61
		Total	$223,586.35

The above figures do not include the interest adjustments made by Federal Deposit Insurance Corporation, nor the majority of adjustments made by the National Bank Examiners.

PLAINTIFF'S PRETRIAL EXHIBIT No. 39

Federal Deposit Insurance Corporation

Certified Copy of Resolution of Board of Directors

I, E. F. Downey, Secretary to the Board of Directors of the Federal Deposit Insurance Corporation, do hereby certify that the attached is a true and correct copy of a resolution duly adopted at a meeting of the Board of Directors of said Corporation, regularly called and held on the 1st day of September, 1942, at which a quorum was present, and that the same has not been amended or rescinded and is now in full force and effect.

In Witness Whereof, I have hereunto subscribed my name and caused the seal of the Corporation to

be affixed hereto, in the City of Washington and District of Columbia, this 1st day of September, 1942.

(Signed) E. F. DOWNEY
Secretary to the Board of Directors of the Federal Deposit Insurance Corporation

RESOLUTION

Whereas, The Harney County National Bank of Burns, Burns, Oregon, an insured national banking association (hereinafter referred to as the "Selling Bank") proposes to sell certain of its assets to The United States National Bank of Portland, Portland, Oregon, an insured bank, (hereinafter referred to as the "Purchasing Bank") in consideration of the assumption by the Purchasing Bank of the liabilities of the Selling Bank to its depositors as shown by its books as of the close of business on the date on which the proposed sale of assets and assumption of deposit liabilities is consummated; and

Whereas, The Selling Bank has various investments which are now carried on its books at more than their present actual cash value, and has sustained losses which have substantially impaired its reserves, surplus and capital, and it is unsafe for the Selling Bank to continue in the banking business; and

Whereas, the Selling Bank has applied to and requested that this Corporation, (a) purchase all of its assets not considered of sound banking quality and not acceptable for acquisition by the Purchasing, Bank, and/or (b) make a loan to the Selling

Bank upon the security of the aforesaid assets, pursuant to the provision of paragraph (4) of subsection (n) of Section 264 of Title 12, U.S.C., as amended; and

Whereas, It appears that unless the aforesaid liabilities of the Selling Bank are assumed by the Purchasing Bank through aid extended by this Corporation as provided in paragraph (4) of subsection (n) of Section 264 of Title 12, U.S.C., as amended, it will probable be necessary that the Comptroller of the Currency of the United States close the Selling Bank on account of inability to meet the demands of its depositors; and

Whereas, It is the judgment of this Board that this Corporation would sustain greater losses in the event of the closing of the Selling Bank and the liquidation of its assets in receivership than in the event of its extending aid to the Selling Bank as hereinafter provided; and

Whereas, This Board has determined to extend aid to the Selling Bank in the form of a purchase of assets and that the proposed purchase will reduce the risk and avert threatened losses to this Corporation and will make possible the consummation of the aforesaid assumption of the aforesaid liabilities of the Selling Bank by the Purchasing Bank;

Now, Therefore, Be It Resolved, That this Corporation purchase from the Selling Bank all of its assets not considered of sound banking quality and not acceptable for acquisition by the Purchasing

Bank, subject to each and all of the following conditions:

1. The proposed assumption of the deposit liabilities of the Selling Bank by the Purchasing Bank in consideration of the transfer and sale to the Purchasing Bank of certain assets of the Selling Bank having an agreed value equal to the amount of the deposit liabilities assumed by the Purchasing Bank shall be consummated concurrently with the aforesaid sale to this Corporation.

2. The exact amount of the purchase price to be paid by this Corporation to the Selling Bank shall equal the difference between the agreed value of the assets classified as acceptable for acquisition by the Purchasing Bank and the amount of the deposit liabilities of the Selling Bank as shown by its books as of the close of business on the date the proposed sale to this Corporation is consummated and shall be based upon the amount necessary to make possible the aforesaid assumption of the deposit liabilities of the Selling Bank by the Purchasing Bank as determined by authorized representatives of this Corporation at the time of the consummation of said sales; provided that the amount of the purchase price to be paid for the assets acquired by this Corporation from the Selling Bank shall not exceed One Million Two Hundred Fifty Thousand ($1,250,000) Dollars.

3. The Selling Bank shall execute a contract embodying the terms of the sale to this Corporation (supported by such exhibits as may be required by

counsel for this Corporation) which shall provide in substance for the transfer to this Corporation of absolute title to the property sold free and clear of any liens or encumbrances or any reserved right, title or interest of any kind or character in favor of the Selling Bank and for the payment of a further contingent purchase price (over and above the initial cash purchase price determined as hereinbefore provided) equal to the amount of the recoveries realized by the Corporation through the liquidation of the property acquired from the Selling Bank in excess of the initial cash purchase price, the costs of liquidation of the property acquired from the Selling Bank in excess of the initial cash purchase price, the costs of liquidation and a service charge or fee equal to four per cent (4%) per annum of the unrecovered portion of the initial cash purchase price and the costs of liquidation.

4. The assets to be acquired by this Corporation by purchase shall consist of all the unacceptable assets of the Selling Bank, including its non-book assets.

5. The proposed purchase transaction shall be duly assented to by the Comptroller of the Currency, the directors of the Selling Bank and of the Purchasing Bank, and by the holders of two-thirds of the voting rights of the outstanding stock of the Selling Bank, and all contracts, conveyances, transfers, assignments, and other documents and all corporate proceedings necessary or proper for the consummation of all phases of the transactions pro-

posed herein and the protection of the Corporation shall conform to the requirements of counsel for this Corporation.

6. Any fees or charges billed to the Selling Bank for services of accountants, attorneys or other specialists in connection with any matters handled on behalf of the Selling Bank at any time prior to disbursement of the amount of the purchase prices to be paid by this Corporation in connection with any phase of the purchase and sale transactions, herein described and referred to, shall be submitted to representatives of this Corporation prior to payment, and no such fees or charges shall be paid in excess of such amounts as may be approved as reasonable by representatives of this Corporation.

7. The Purchasing Bank shall enter into an agreement in form required by this Corporation providing for the furnishing of such facilities and the performance of such services as may be required by this Corporation, without expense to this Corporation save and except out-of-pocket expenses incurred in connection with the liquidation of the assets purchased by this Corporation.

8. This Corporation shall be furnished with suitable assurance that the management of the Purchasing Bank is satisfactory; such assurance to be through approval by the Comptroller of the Currency, or otherwise as the Chairman of this Corporation may determine.

9. The commitment of this Corporation herein set forth shall forthwith expire:

(a) If the Selling Bank shall cease to be an operating institution under the management of its Board of Directors prior to the disbursement of the purchase prices to be paid to it by this Corporation as hereinabove provided.

(b) If all phases of the proposed transaction between the Purchasing Bank and the Selling Bank and this Corporation, hereinabove provided for, shall not have been completed within ninety (90) days from date.

10. Such other and further conditions as may be required by the Chairman of the Board of Directors of this Corporation.

Further Resolved, That prior to the actual disbursement of the initial cash purchase price to be paid by this Corporation as hereinbefore provided, there shall be no agreement or obligation on the part of this Corporation to purchase any property from the Selling Bank.

Further Resolved, That W. G. Loeffler, Fiscal Agent for this Corporation, be and he is hereby authorized and directed upon receipt by him of satisfactory evidence that all of the conditions hereinabove set forth have been fulfilled, to disburse from funds now deposited to the credit of the Corporation with the Treasury of the United States, an amount equal to the initial cash purchase price certified by the authorized representatives of this Corporation to be necessary to make possible the assumption of the deposit liabilities of the Selling Bank by the Purchasing Bank; provided that the

amount so disbursed shall not exceed the sum of One Million Two Hundred Fifty Thousand Dollars ($1,250,000).

Further Resolved, That W. G. Loeffler, Fiscal Agent, be and he is hereby authorized and directed to issue and deliver to the Acting Chief of the Division of Liquidation, the Supervising Liquidator, or the Acting Supervising Liquidator, a check in the amount of Five Thousand ($5000) Dollars payable to the order of the Purchasing Bank for credit to the account of the Corporation which shall be deposited in the Purchasing Bank to be used as an Imprest Fund for the completion of this transaction and for the liquidation of the assets; and that as vouchers are submitted from time to time showing the proper disbursement of any portion of said funds, said Fiscal Agent be and he is directed to disburse such further sums as shall be necessary to maintain at all times a balance of $5,000 in such Imprest Fund.

Further Resolved, That withdrawals from such account may be made on the signature of a designated Examiner in Charge of completion of the purchase transaction, Liquidator or Assistant Liquidator in Charge of the liquidation of the purchased assets; and that the Chief or Acting Chief of the Division of Liquidation or Supervising Liquidator or Acting Supervising Liquidator of this Corporation may designate the Examiner in Charge, Liquidator or Assistant Liquidator for the purpose of making such withdrawals.

Further Resolved, That the Chairman of the Board of Directors of this Corporation or such person or persons as he may designate, be and they are hereby authorized to execute for and on behalf of this Corporation such instruments as may be necessary or proper to carry out the terms of this resolution.

Further Resolved, That the Chairman of the Board of Directors of this Corporation be and he is hereby authorized to amend or waive any of the conditions of this resolution provided such amendment or waiver is, in his judgment, consistent with the best interest of this Corporation.

Further Resolved, That if it shall appear desirable to the Corporation to make a loan or loans to the Selling Bank under the provisions of paragraph (4) of subsection (n) of Section 264 of Title 12, U.S.C., as amended, to be secured by any or all of such unacceptable assets instead of purchasing such unacceptable assets as hereinabove provided, such loan or loans to the Selling Bank, in an amount not to exceed the initial cash purchase price hereinabove provided for may be made and consummated on such terms and conditions as shall be required and prescribed by counsel for the Corporation, and the amount of such loan or loans shall be disbursed as hereinbefore provided with respect to the initial cash purchase prices provided that the aggregate amount to be disbursed by the Corporation either by way of purchase price or loan or loans shall not exceed the amount of the commitment set forth in condition No. 2 hereof.

PLAINTIFF'S PRETRIAL EXHIBIT No. 40

This Agreement, made and entered into this 29th day of August, 1942, by and between the Harney County National Bank of Burns, a national banking association duly organized and existing under and by virtue of the laws of the United States, with its principal office in Burns, Oregon (hereinafter referred to as the "Bank"), and the Federal Deposit Insurance Corporation, a corporation created and existing under and by virtue of an act of the Congress of the United States, having its principal office in the City of Washington, District of Columbia, (hereinafter referred to as the "Corporation"):

Witnesseth:

Whereas, the Bank has various investments which are now carried on its books at more than their present actual value and has sustained losses which have wholly exhausted and wiped out its reserves, surplus and capital, and it is unsafe for the Bank to continue in the banking business without new or additional capital and the Bank desires to protect its depositors against losses which would be sustained in the event of forced liquidation of its investment; and

Whereas, the Bank proposes to sell certain of its assets to The United States National Bank of Portland, a national banking association duly organized and existing under and by virtue of the laws of the United States with its principal office in Portland, Oregon, in consideration of the assumption of the

deposit liabilities of the Bank as shown by the Bank's books as of the close of business on the date hereof; and

Whereas, the Bank has filed an application requestion the Federal Deposit Insurance Corporation to purchase certain assets of the Bank and/or to loan money on the security of said assets in order to facilitate and make possible the proposed sale of assets to, and the aforesaid assumption of the deposit liabilities by the United States National Bank of Portland; and

Whereas, the Board of Directors of the Federal Deposit Insurance Corporation has determined that the Federal Deposit Insurance Corporation will not make a loan to the bank but will purchase, on certain terms and conditions, all of the assets of the Bank not purchased and acquired by The United States National Bank of Portland, as aforesaid, and has concluded that such purchase of assets by the Federal Deposit Insurance Corporation will reduce a risk and avert a threatened loss to the Federal Deposit Insurance Corporation; and

Whereas, the Initial Cash Purchase Price (as defined in Section 12 hereof) to be paid by the Federal Deposit Insurance Corporation for such assets together with certain other assets of the bank (consisting of cash, high-grade securities, and other assets considered to be of sound banking quality and acceptable for acquisition by The United States National Bank of Portland) will equal the aggregate amount of the deposit liabilities of the Bank as

shown by its books of account as of the close of business on the date hereof; and

Now, Therefore, each of the parties hereto intending to be legally bound hereby, do severally undertake, promise, covenant, and agree each with the other, and the Bank does hereby represent, warrant, covenant and agree to and with the Federal Deposit Insurance Corporation, as follows:

1. The Bank hereby acknowledges that if filed an application requesting the Federal Deposit Insurance Corporation to purchase certain assets of the Bank and/or to loan money on the security of said assets and that it has been determined by the Federal Deposit Insurance Corporation that it will not make a loan to the Bank but will purchase certain assets of the Bank instead.

2. The Bank hereby warrants that at the close of its Business on the date hereof (Immediately prior to execution and delivery of this instrument) the assets of the Bank consist of two classes:

(a) The first class of "acceptable assets" consists of each, deposits in other banks and certain investments of the Bank of sound banking quality (With adjustments for accrued interest and unearned discount) which are being sold, transferred, assigned, and conveyed to The United States National Bank of Portland at agreed values under the terms of a contract bearing even date herewith.

(b) The second class or "unacceptable assets", consists of every other asset and all other property of the Bank.

Exhibit "A" hereto shows as at the close of its business on the date hereof (Immediately prior to the execution and delivery of this instrument), the total assets and liabilities of the Bank as shown by its books of account, the total acceptable assets of the Bank (shown in the column headed "acceptable assets") and the total unacceptable assets of the Bank as shown by the books of the Bank (shown in the column headed "unacceptable assets"), but does not show assets of the Bank which do not appear on its books and which for the purposes hereof are included in classification of "unacceptable assets". Such exhibit identifies the several classes of assets only through the totals in the central accounts in the general ledger of the Bank, and for a more particular description of the individual items comprising these totals. Reference is made to the books of account and supporting records and files of the Bank, on which the detail of such items will appear.

3. The Bank does hereby sell, grant, convey, assign, transfer and set over to the Corporation, all of its property other than:

(a) The "acceptable assets" of the Bank shown in Exhibit "A" hereto, and records pertaining thereto;

(b) The property held by the Bank as bailee or as fiduciary for other than itself, and the records pertaining to its activities as fiduciary;

(c) The records of the Bank pertaining to its deposit liabilities as shown upon its books immediately prior to the execution and delivery of this instrument.

Without any limitation on the generality of the foregoing, the property so sold, granted, conveyed, assigned, transferred and set over to the Corporation (hereinafter sometimes referred to as the "property sold"), shall expressly include, without being limited to, each and all of the following:

(1) All "unacceptable assets" of the Bank, shown in Exhibit "A" hereto.

(2) All assets of the Bank which are not carried on its books of account or which are carried on such books at a nominal amount for bookkeeping purposes.

(3) All property specifically listed on certain paper records known as "Line Sheets", heretofore jointly prepared by representatives of the Bank and the Corporation and now in the possession of the Corporation, each such Line Sheet being marked with the legend:

"The property described in the within memorandum has been and is hereby sold, granted, conveyed, assigned, transferred and set over to the Federal Deposit Insurance Corporation pursuant to the terms of a contract dated August 29, 1942.

THE HARNEY COUNTY
NATIONAL BANK OF BURNS

By .....
President/Cashier

Dated: Burns, Oregon, August 29, 1942."

(the property described on such Line Sheets being also more particularly described on the books of account or in the records of the Bank, to which reference is made for a more particular description thereof).

(4) All property of the Bank which heretofore had been specifically endorsed to the Corporation, or granted, conveyed, transferred or assigned to the Corporation by deeds or other written instruments of conveyance or transfer, specifically referring to the property conveyed or transferred, or delivered to its representatives, whether or not listed on such Line Sheets.

(5) All contracts, rights, claims, demands, chosen in action or causes whatsoever, pending causes of action, and judgments, whether known or unknown, which the Bank owns, holds or has against any person or persons whomsoever, including, without being limited to, any claims against its stockholders for payment of or by reason of ownership of its capital stock (neither the mention of the foregoing liability or the approval of this agreement by the Bank and/or its stockholders shall be deemed an admission by said Bank or stockholders of the existence of such liability) any claims against its directors, officers or employees or their sureties arising out or any act of any such persons in respect to the Bank or its property or arising out of the non-performance or manner of performance of their duties, any claims against any person for money or property of the Bank, or for damages, which the Bank may have or own.

(6) A non-negotiable demand promissory note bearing even date herewith in the sum of $906,856.47 executed by the Bank in favor of the Corporation and secured by any property, assets, rights, claims or causes of action, which under the law, or for any other reason, are not assignable or transferable or

which the Corporation may consider to be non-assignable or non-transferable. In the event the Corporation receives any net excess recoveries as defined in Section 12 herein, then said note shall be forthwith cancelled by the Corporation and returned to the Bank or the liquidating agent or committee representing the interests of the stockholders of the Bank.

(7) All moneys, credits or other property of every kind or character acquired by the Bank as the result of its sale, collection or enforcement of any of the "property sold" which have not been applied or credited on the assets comprising the "property sold."

(8) All fees or commission due, or which shall hereafter become due to the Bank for any services performed by the Bank as fiduciary or in a fiduciary capacity.

(9) All books of account, records, correspondence files and credit files of the Bank pertaining to any of the "property sold."

4. Upon the completion of the Corporation of written schedule, now under preparation, containing a more particular description or inventory of such of the property sold as is known, the Bank agrees to identify the same by signature of its authorized agents in its behalf and affixation of its corporate seal. Such schedules shall be and become exhibits forming a part of this agreement, although not attached hereto. The omission of the Corporation to list any item of property sold in such schedules shall not be deemed to exclude such omitted item from the

sale, if otherwise included in the general description of the property sold.

5. The Bank warrants that it has heretofore delivered to the Corporation, all of the property sold which is capable of manual delivery, and has heretofore duly executed, acknowledged and delivered to the Corporation instruments of conveyance, assignment or transfer, or has made endorsements of each known item of property sold, in order to vest absolute title in the Corporation for each item of the property sold. The Bank covenants and agrees on behalf of itself, its successors, legal representatives and assigns, on request of the Corporation to execute such further instruments of conveyance, assignment or transfer, to make such endorsements, to make such deliveries and to give such further assurances as shall be necessary or proper to vest in or confirm to the Corporation whatever right, title and interest the Bank has on the date hereof in any of the property sold, which through inadvertence, by reason of lack of discovery or otherwise, may not heretofore have been effectively conveyed or transferred to the Corporation. The form and content of each such instrument of conveyance, assignment or transfer or of such endorsements and the manner of such deliveries, shall conform with the requirements of the Corporation and shall be so done as to vest in the Corporation the absolute and unqualified title in fee simple to all of the property sold.

6. Notwithstanding the form of any endorsement by the Bank to the Corporation of notes or other negotiable instruments the Bank expressly warrants

that each such instrument is genuine and in all respects what it purports to be; that it has good title to each such instrument; that all prior parties had capacity to contracts; that it has no knowledge of any fact which would impair the validity of the instrument or render it valueless and that the balance due on each such instrument is as shown by such instrument. The Bank agrees for itself, its successors, legal representatives or assigns, to enforce for the benefit of the Corporation, under the direction and at the expense of the latter, all rights or claims which the Bank may be entitled to enforce with respect thereto by reason of the facts or circumstances constituting a breach of such warranty, and to turn over to the Corporation all things of value realized by it as the result of any such action. The Bank further agrees to enforce or liquidate for the benefit of the Corporation and under the direction and at the expense of the latter, any rights, claims or other property which are included in the description of the property sold but which are not assignable or transferable for any reason, and any rights or claims which it may have under any covenants in any conveyances to the Bank of any real property sold by the Bank to the Corporation which cannot be enforced by the Corporation in its own name for any reason, and any other rights or claims, including but not being limited to general and special warranties of every kind and character, which are incident to the property sold but which cannot be enforced by the Corporation in its own name for any reason.

7. The Bank agrees to preserve and safely keep all of its files, books of account and records not included in the property sold to the Corporation or to The United States National Bank of Portland, for the joint benefit of itself and the Corporation and that it will permit the Corporation to inspect and make extracts from or copies of any of such files, books, or records at any reasonable time. None of such files, books, or records shall be destroyed until such time as the Corporation may consent in writing to the destruction thereof.

8. The agreed value of the acceptable assets as shown in exhibit "A" hereto, together with the sum of $906,856.47 of the Initial Cash Purchase Price being paid for the property sold to the Corporation constituting the consideration initially received by the Bank hereunder, is intended to equal, but not exceed, the aggregate amount of the liabilities of the Bank to its depositors at the close of business on the date hereof, as shown in Exhibit "C." The Bank warrants Exhibit "C" to be true and correct; but if, through omissions, errors in bookkeeping, listing, computation or otherwise, the amount due to depositors of the Bank actually shall be less than the aggregate amount thereof as of the close of business on the date hereof shown in Exhibit "C", then the Bank authorizes and directs The United States National Bank of Portland to pay over to the Corporation the amount of such difference forthwith upon discovery thereof (such difference or payment to constitute a part of the prop-

erty sold by the Bank to the Corporation under this agreement).

9. The Bank hereby covenants and warrants that it has ceased to have any right, title or interest in or to any of the property sold to the Corporation, of any nature, legal or equitable, and that henceforth the Corporation shall have the absolute ownership of all of the property sold free and clear of all liens, encumbrances or claims, of any nature, legal or equitable, express or implied, and of all rights incident thereto. Neither this instrument nor any other instrument executed by the Bank in connection with the transaction singly or collectively, shall be construed to be a mortgage or mortgages or to create or continue any right in rem in the Bank with respect to any of the property sold to the Corporation. The Bank hereby expressly waives and relinquishes any and all purchase money liens granted or implied by law in its favor as seller of any of the property sold.

10. The Bank hereby irrevocably nominates, constitutes and appoints James N. Markham, Wheeler McDougal, Francis C. Brown and John L. Cecil, who are agents of the Corporation, or either or any of such persons, the true and lawful attorneys of the Bank, for it and in its name, place and stead, with full power of substitution and revocation, to sign, endorse or acknowledge any and all checks, drafts, bills of exchange, evidences of debt, stock powers, bills of sale, deeds, mortgages, assignments of mortgages, assignments of choses in action, indebtedness or other personal property, releases, or

other instruments in writing of like or different nature, as may be necessary or proper to convey or perfect title of the Corporation to all or any of the property sold or to effect the collection or liquidation thereof, to protect or preserve the same, or fully to enjoy the incidents of absolute ownership of the same.

11. In the event any action at law or in equity shall be instituted by any person against the Bank and the Corporation as co-defendants, the Bank agrees to join with the Corporation in a petition to remove the action to the United States District Court for the proper district, and hereby authorizes and appoints as its attorney for the purpose of effecting such removal, any attorney designated by the Corporation to act in that capacity. The Bank agrees to institute as party plaintiff, with or without joinder of the Corporation as co-plaintiff, any action with respect to any of the property sold, or any of the property intended to be sold under this agreement, or any matter connected therewith, whenever notice requiring such action shall be given by the Corporation to the Bank stating that in the opinion of counsel for the Corporation such action is requisite for the proper protection of the Corporation or the proper protection or enforcement, collection or liquidation of any of such property.

12. The Corporation agrees to and does hereby purchase from the Bank the property sold to is by the Bank for the sum of (a) $906,856.47 in cash, to be paid upon the delivery and exchange of executed copies of this agreement, and (b) the amount of the

liability or liabilities, if any, of the Bank to any depositor or depositors for any reason act included and listed in Schedule "A" hereto, provided that the Corporation alone and in its sole and absolute discretion shall determine, and such determination by it shall be final, the amount of the liability or liabilities, if any, and the identity of the depositor or depositors of the Bank, if any, not so included and listed in said Schedule "A". The said cash payment of $906,856.47 plus any payments under clause (b) of this section shall constitute the initial Cash Purchase Price to be paid by the Corporation to the Bank and the words, "Initial Cash Purchase Price", wherever elsewhere used in this agreement shall only include and have reference to the payments by the Corporation provided for in clauses (a) and (b) of this section, in addition to the Initial Cash Purchase Price and as part of the purchase price of the property sold to is by the bank, the Corporation agrees to pay a further sum, if any, which further sum is described, defined and limited as follows (and as so described defined and limited is hereafter called the "further sum"). The further sum shall be in the amount of the net recoveries, if any, received by the Corporation from the collection inforcement, liquidation, resale or operation of the property sold to it by the Bank in excess of:

(1) The amount of the initial cash purchase price to be paid by the Corporation to the Bank, as in this section first hereinbefore provided; and

(2) All costs of liquidation paid or incurred by

the Corporation in connection with the property sold; and

(3) A reasonable return to the Corporation on the aggregate amount which the Corporation from time to time has invested in the property sold, including, without being limited to: (a) the amount of the initial cash purchase price referred to in subdivision (1) of this section, and (b) all costs of liquidation referred to in subdivision (2) of this section, such return to be an amount equivalent to 4% per annum of the total unrecovered, unrealized or uncollected amount of such investment by the Corporation, after allowing for said recoveries effected by the Corporation from time to time, such recoveries to be applied and such reasonable return to be computed at such reasonable intervals as may be consistent with the prevailing accounting practices of the Corporation.

The term "costs of liquidation" as herein employed, shall include all sums expended or liabilities assumed or incurred by the Corporation heretofore or hereafter in any way arising out of or connected with any of the following:

(a) The investigation or examination of the Bank or its property preparatory to or connected with the transfer to the Corporation of the property sold or the negotiation or consummation of the purchase and sale provided for in this agreement;

(b) The supervision, administration, management, control, ownership, operation, improvement, reconstruction, modernization, repairing, replacement, restoration, protection, preservation, enforce-

ment, collection, liquidation, disposition, sale or resale of the property sold;

(c) Obligations or liabilities adjudicated against or imposed upon the Corporation, or voluntarily assumed by the Corporation by way of compromise or otherwise, arising out of or connected with the purchase by the Corporation of any of the property sold or this agreement or any phase of the transaction set forth in this agreement or any act or failure to act of the Corporation or any of its agents, with respect to any of the property sold, including, without being limited to, the expense of investigating, defending or prosecuting any claims or litigation and any counsel fees and Court costs connected therewith;

(d) Any act done or undertaking assumed or entered into by the Corporation at any time with respect to the Bank or for the benefit of the Bank or from which the Bank may derive any direct or indirect benefit in any way connected with the property sold, this agreement or any phase of the transaction set forth in this agreement, including without being limited to, any loss which the Corporation may sustain or liability which it may incur by reason of any property which the Corporation at any time may purchase or acquire from the Bank or any subsidiary corporation of the Bank, or any corporations, substantially all of the stock of which is owned or controlled by the Bank;

(e) Any other expenses, expenditures made or liabilities assumed or incurred by the Corporation bearing any reasonable relation to the property sold

or to any act or failure to act of the Corporation with respect to the property sold or to any phase of the transaction set forth in this agreement, whether of the same or different character as the expenditures or liabilities hereinbefore specifically enumerated;

(f) In each instance, the foregoing specifically enumerated items of expenditure or liability shall be deemed to include, without being limited to, salaries of employees of the Corporation, fees, commissions, charges and expenses paid or incurred by the Corporation to attorneys, accountants, real estate brokers, real estate operators, appraisers, engineers, security brokers, insurance brokers, auditors or other specialists; amounts paid or incurred for travel, subsistence, telephone, telegraphic or other communication facilities; amounts paid or incurred for the purchase, rental, operation and maintenance of automobiles, machinery equipment, furniture and fixtures; rentals paid or incurred for office space; amounts paid or incurred for real estate taxes, assessments, liens, encumbrances, due or charges; amounts paid or incurred for repairing, improving reconstructing, modernizing, preserving, restoring, replacing, managing or operating real estate, improvements on real estate or other property included in the property sold; the cost of bookkeeping, accountings, appraisals, examinations, audits or reports, and the cost of surety bonds, insurance and indemnifications of every kind or character and all other expenses of collection, enforcement, liquida-

tion, ownership, operation or resale of the property sold, or arising out of any phase of the transaction set forth in this agreement.

Any net income which may be received by the Corporation from the specific property sold pending the collection, enforcement, resale or other liquidation of such property by the Corporation, shall be considered recoveries from the operation by the Corporation of the property sold. If the Corporation shall elect at any time to foreclose a borrower's right, title to or interest in any collateral held as security to any of the "property sold" and to purchase said collateral at said sale, any gain realized from the resale by the Corporation of the property so purchased shall be considered recoveries from the "property sold" and any loss suffered from the resale of said property shall be deductible from said recoveries in determining the amount, if any, of the Further Sum. The Intitial Cash Purchase Price and the Further Sum constitute the full consideration to be paid by the Corporation to the Bank. There shall be no liability or obligation upon the Corporation to pay any Further Sum unless and until the excess recoveries referred to in this Section in the definition of "Further Sum" shall have been actually received by the Corporation.

13. The right of the Bank under Section 12 of this agreement to a Further Sum is conditional, and limited to the receipt of the further sum, if any, which may become due it, determined as hereinbefore provided. This agreement does not give and

shall not be construed to give the Bank any right in or to any portion of the property sold which may remain after the Corporation shall have been fully reimbursed and no portion of such excess property shall revert to or revest in kind in the Bank. The Bank shall have no right to interfere by legal process or otherwise with the absolute management and control by the Corporation incident to its absolute ownership of the property sold, including, without being limited to, the right of the Corporation in its absolute and uncontrolled discretion to liquidate collect, exchange, sell or dispose of the property sold to is by the Bank at public or private sale, without notice to the Bank, item by item or in bulk, to make sales contracts and to agree to releases, extensions, compromises, compositions and adjustments, and to enter into contract of every kind or character with respect to such property and to do all things incident to its absolute ownership of the property. The Corporation shall not be held in any Court or otherwise to account for any act taken by it with respect to all or any item or portion of the property sold by the Bank to the Corporation, but shall be liable only to pay over to the Bank the Further Sum, if any, to which the Bank may become entitled under the terms of this agreement.

14. The Bank acknowledges that the sum of $906,856.47 of clause (a) of the Initial Cash Purchase Price paid by the Corporation for the property sold exceeds the present or probably future realizable value of the property sold and agrees

that the finding or determination by unanimous vote of the directors of hte Corporation, based upon the reports of the accounting department employees of the Corporation, of the amount of the further sum payable to the Bank under this agreement, or that nothing further is payable to the Bank, shall be binding and conclusive on the Bank, and the Bank agrees to indemnify and hold harmless the Corporation from any cost or expense of any kind or character arising out of any effort which it or any stockholders may make, notwithstanding the provisions hereof, through litigation or otherwise, to require any accounting or to dispute the conclusive effect of any finding or determination by the corporation.

15. The Bank authorizes the Corporation to make or cause to be made in such manner and at such times as the Corporation may determine, inspections and audits of any books, records and papers in the custody or control of the Bank and others relating to the financial or business condition of the Bank, including the making of copies therefor and extracts therefrom and the inspection and valuation of any of its assets. All constituted federal, state, municipal and other authorities, including but not being limited to, the United States Treasury Department, the Bureau of Internal Revenue, the Board of Governors of the Federal Reserve System and the Comptroller of the Currency are hereby authorized to furnish reports of examinations, records and other information relating to the conditions

and affairs of the Bank, upon request therefor by the Corporation, and are authorized to permit representatives of the Corporation to have full access from time to time to, and to make copies of and extracts from, all reports by or with respect to the Bank and all information concerning the Bank from time to time contained in their files and records.

16. The Bank warrants that the laws pursuant to which the Bank is incorporated and subject to which it conducts its business, and its articles of incorporation or charter, by-laws and other regulations, and the corporate proceedings heretofore taken, together with the approval of the Comptroller of the Currency heretofore received by the Bank, authorize and permit the Bank to sell property to the extent, in the manner and for the amount and on the terms set forth in this agreement.

17. Warranties against encumbrances in any deed to real estate heretofore or hereafter executed by the Bank in favor of the Corporation covering any item of real property sold, shall not be deemed to extent to unpaid taxes or local assessments which are or may become a lien on the real property so conveyed by the Bank to the Corporation.

18. This agreement sets forth an understanding orally agreed to between the parties hereto on August 17, 1942, and for the purpose of fixing the rights of the Corporation as a holder in due course or for value of any negotiable instrument as against any person liable thereon, the title of the Corporation shall be deemed to relate back to that date.

19. This agreement and any amendments or sup-

plements hereto, together with all conditions imposed by, and all collateral instruments executed or entered into with or for the benefit of the Corporation in connection with its purchase of the property sold pursuant to the application to the Corporation heretofore made by the Bank shall constitute the contract between the Bank and the Corporation. Such contract shall inure solely to the benefit of the Corporation its legal successors and assigns, and shall be binding upon and inure to the benefit of the Bank, its legal successors and assigns, but shall not be assignable by the bank as a whole or in part without the written consent of the Corporation, and shall not be construed to inure to the benefit of any parties other than the parties hereto.

20. No modification, recession, waiver, release or annulment of any part of such contract shall be effective, except pursuant to a written agreement subscribed by a duly authorized officer of the Corporation.

21. All exhibits, writings and contracts referred to in this agreement shall be and are incorporated herein by reference, with the same force and effect as if set forth herein at length.

22. The following instruments shall be deemed exhibits to this agreement:

Exhibit "A": Schedule as to the close of business on August 29, 1942, showing segregation of the assets of the Bank into "acceptable assets" and "unacceptable assets."

Exhibit "B": Schedules of property sold.

Exhibit "C": Certified copy of agreement providing for the sale of certain assets to and the assumption of deposit liabilities by The United States National Bank of Portland.

Exhibit "D": Certified copy of minutes of special meeting and adjourned special meeting of the Board of Directors of the Bank.

Exhibit "E": Certificate as to officers authorized to act for Bank.

Exhibit "F": Certified copy of minutes of special meeting of stockholders of the Bank.

Exhibit "G": Opinions of Counsel.

Exhibit "H": Certified copy of the articles of incorporation or charter, by-laws and regulations of the Bank including all amendments to date.

23. The rights and obligations of the parties hereto shall become effective forthwith upon disbursement by the Corporation of the amount of the initial cash purchase price provided to be paid in accordance with Section 12 of this agreement.

In Testimony Whereof, the parties hereto have executed this agreement by their officers thereunto duly authorized and the Bank has caused its corporate seal to be affixed hereto.

THE HARNEY COUNTY
BANK OF BURNS
By BEN BROWN
President

Attest:

[Seal] LEON M. BROWN
Cashier
FEDERAL DEPOSIT INSURANCE CORPORATION
By FRANCIS C. BROWN

Witness:

LUCY M. BROOKFIELD

State of Oregon,
County of Harney—ss.

On this 29 day of August, 1942, before me appeared Ben Brown to me personally known, who, being duly sworn, did say that he is the President of the Harney County National Bank of Burns, Burns, Oregon, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Ben Brown acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal this the day and year first in this, my certificate written.

ORVAL D. YOKOM
Notary Public in and for said County and State.
My Commission expires April 7, 1946.

LIABILITIES

Cash in '	$962,575.63	
Cash in T	5,012.60	
Cash Iter	73.60	
Due from	1.00	$ 967,662.83
Due from Banking		
Prepaid	$ 66,740.56	
Prepaid I	230,141.26	
Postage S	1,470.98	
Recordak	15.00	298,367.80
Loans an Stock &		
Other Re: D's	586.09	
Overdraf tvings	571.82	
Note exest. Savings	4.90	
Nationawn on First Special Aland, Oregon	255.68	1,418.49
Claim vs.		
		$ 1,267,449.12

Total Acc
Add: Pur
able A
Non-Bo

red ..... $ 1,267,449.12

Attest:

[Seal] LEON M. BROWN
Cashier
FEDERAL DEPOSIT INSURANCE CORPORATION
By FRANCIS C. BROWN

Witness:

LUCY M. BROOKFIELD

State of Oregon,
County of Harney—ss.

On this 29 day of August, 1942, before me appeared Ben Brown to me personally known, who, being duly sworn, did say that he is the President of the Harney County National Bank of Burns, Burns, Oregon, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation by authority of its Board of Directors, and said Ben Brown acknowledged said instrument to be the free act and deed of said corporation.

In Testimony Whereof, I have hereunto set my hand and affixed my official seal this the day and year first in this, my certificate written.

ORVAL D. YOKOM
Notary Public in and for said County and State.

My Commission expires April 7, 1946.

EXHIBIT "A"

THE HARNEY COUNTY NATIONAL BANK

BURNS, OREGON

AT THE CLOSE OF BUSINESS, AUGUST 29, 1942

ASSETS

	Acceptable Assets	Unaccepted Assets	Total Assets
Cash in Vault	$ 92,512.41		$ 92,512.41
Cash in Transit	1,200.00		1,200.00
Cash Items	1,981.86		1,981.86
Due from U. S. National Bank	80,057.86		80,057.86
Due from Federal Reserve	159,082.26		159,082.26
Banking House and Fixtures	25,000.00		25,000.00
Prepaid Ins. on Bank Bldg.	383.87		383.87
Prepaid F. D. I. C. Assessment	331.24		331.24
Postage Stamps	10.15		10.15
Recordak Films 6 x 5 50	33.00		33.00
Loans and Discounts		$ 253,192.62	253,192.62
Stock & Bonds		342,172.53	342,172.53
Other Real Estate		9.00	9.00
Overdraft Account		3,272.19	3,272.19
Note executed by Harney County National Bank		800,000.00	800,000.00
Special Account for Adjustment		150,000.00	150,000.00
Claim vs. Edward Brown Estate		268,187.03	268,187.03
Total	$360,592.65	$ 1,816,833.37	$ 2,177,426.02

LIABILITIES

Demand Deposits:		
Subject to Check	$962,575.63	
Cashiers' Checks	5,012.60	
Certified Check	73.60	
Demand Certificates	1.00	$ 967,662.83
Time Deposits:		
Ctfs. of Deposit	$ 66,740.56	
Savings Accounts	230,141.26	
Postal Savings	1,470.98	
Cash Letters of Credit	15.00	298,367.80
Other Liabilities:		
Accured Interest on C. D's.	586.09	
Accrued Interest on Savings	571.82	
Accrued Interest on Post. Savings	4.90	
Outstanding Drafts drawn on First National Bank, Portland, Oregon	255.68	1,418.49
		$ 1,267,449.12

RECAPITULATION

Total Acceptable Assets	$ 360,592.65
Add. Purchase price of Unacceptable Assets together with all Non-Book and Charged off Assets	906,856.47
	$ 1,267,449.12

Total Liabilities Transferred ..... $ 1,267,449.12

Certified Correct:

(Seal) HARNEY COUNTY NATIONAL BANK
BURNS, OREGON

By LEON M. BROWN,
Cashier

United States of America,
District of Oregon—ss.

CERTIFICATE OF CLERK

I, Lowell Mundorff, Clerk of the District Court of the United States for the District of Oregon, do hereby certify that the foregoing pages numbered from 1 to 95 inclusive, constitute the transcript of record upon the appeal from a judgment of said court in a cause therein numbered Civil 1412, in which Ruby M. Brown is plaintiff and appellant, and New York Life Insurance Company is defendant and appelee; that said transcript has been prepared by me in accordance with the designation of contents of the record on appeal filed by the appellant and in accordance with the rules of Court; that I have compared the foregoing transcript with the original record thereof and that it is a full, true and correct transcript of the record and proceedings had in said court in said cause, in accordance with the said designation, as the same appears of record and on file at my office and in my custody.

I further certify that the cost of comparing and certifying the within transcript is $35.70 and that the same has been paid by said appellant.

I further certify that I have enclosed under separate cover a duplicate transcript of the testimony taken in this cause together with exhibits 1 to 19, 26 to 28, 30 to 32, 34 to 36, 37 to 40 and 40 A, 44 to 46, 48 and 51.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court in Portland, in said District, this 7th day of March, 1945.

[Seal] LOWELL MUNDORFF
Clerk
By F. L. BUCK
Chief Deputy. [95]

[Endorsed]: No. 11000. United States Circuit Court of Appeals for the Ninth Circuit. Ruby M. Brown, Appellant, vs. New York Life Insurance Company and Federal Deposit Insurance Corporation, Appellees. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Oregon.

Filed March 9, 1945.

PAUL P. O'BRIEN
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11000

RUBY M. BROWN,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Defendant,

FEDERAL DEPOSIT INSURANCE CORPORATION,

Appellee.

STATEMENT OF POINTS ON WHICH APPELLANT INTENDS TO RELY ON APPEAL AND DESIGNATION OF RECORD TO BE PRINTED

Appellant hereby adopts as its points on appeal the Statement of Points appearing in the certified transcript of the record.

Appellant hereby designates for printing the following portions of the certified transcript on appeal:

(1) Pretrial Order,

(2) Opinion dated June 12, 1944, filed July 12, 1944,

(3) Findings of Fact and Conclusions of Law,

(4) Judgment Order,

(5) Motion to Amend Pretrial Order and for a New Trial,

(6) Affidavit in Opposition to Plaintiff's Motion to Amend Pretrial Order and for a New Trial,

(7) Order denying Motion to Amend Pretrial Order and for a New Trial,

(7a) Notice of Appeal,

(8) Exhibit 34, and

(9) Exhibit 40.

/s/ HAMPSON, KOERNER,
YOUNG & SWEET
JAMES C. DEZENDORF
Attorneys for Appellant

State of Oregon
County of Multnomah—ss.

Service of the foregoing Statement of Points on which Appellant Intends to Rely on Appeal and Designation of Record to be Printed by Copy, as prescribed by law, is hereby admitted at Portland, Oregon, this 15th day of March, 1945.

ROBT. F. MAGUIRE
Of Attorneys for Appellee

[Endorsed]: Filed March 19, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

STIPULATION

In connection with the designations by Appellant and Appellee of the record to be printed herein,

It Is Hereby Stipulated and Agreed that Exhibits 39 and 40 shall be printed in full and that the first page of Exhibit 34, which is the summary of the numerous yellow sheets attached thereto, shall be printed but that the yellow sheets attached thereto

need not be printed and Appellant and Appellee request that the yellow sheets attached to the summary and all other exhibits which have been filed with the Clerk at San Francisco be considered in their original form because of the difficulty and expense incident to printing thereof.

Dated this 26th day of March, 1945.

JAMES C. DEZENDORF
Of Attorneys for Appellant,
ROBERT F. MAGUIRE
By ROBERT H. AGNEW
Of Attorneys for Appellee

[Endorsed]: Filed March 27, 1945. Paul P. O'Brien, Clerk.

[Title of Circuit Court of Appeals and Cause.]

ORDER

A stipulation so providing having heretofore been filed herein,

It Is Hereby Ordered that Exhibits 39 and 40 and the summary sheet of Exhibit 34 shall be printed and included in the printed record, and

It Is Further Ordered that the yellow sheets attached to the summary sheet of Exhibit 34 and all other exhibits filed herein shall be considered by this Court in their original form.

Dated at San Francisco, California, this 27th day of March, 1945.

FRANCIS A. GARRECHT
United States Circuit Judge

State of Oregon
County of Multnomah—ss.

Service of the foregoing Order by copy, as prescribed by law, is hereby admitted at Portland, Oregon, this 26th day of March, 1945.

ROBERT F. MAGUIRE
By ROBERT H. AGNEW
Attorney for Appellee

[Endorsed]: Filed March 27, 1945. Paul P. O'Brien, Clerk

No. 11000

In the United States
Circuit Court of Appeals
For the Ninth Circuit

RUBY M. BROWN,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY, *Defendant,*

FEDERAL DEPOSIT INSURANCE CORPORATION, *Appellee.*

Brief of Appellant

Upon Appeal from the District Court of the United States for the District of Oregon.

HAMPSON, KOERNER, YOUNG & SWETT,
JAMES C. DEZENDORF,
Attorneys for Appellant,
800 Pacific Buiding,
Portland 4, Oregon.

DAILY JOURNAL OF COMMERCE

INDEX

TABLE OF CASES

STATUTES AND TEXTS

No. 11000

In the United States Cirruit Court of Appeals

For the Ninth Circuit

RUBY M. BROWN,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Defendant,

FEDERAL DEPOSIT INSURANCE CORPORATION,

Appellee.

Brief of Appellant

Upon Appeal from the District Court of the United States, for the District of Oregon

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JURISDICTIONAL STATEMENT

Appellant, a citizen of Oregon, brought this action against Defendant New York Life Insurance Company, a New York corporation, upon two checks issued to her by it, aggregating $20,582.00, payment of which was refused by the bank on which they were drawn.

By way of answer and cross complaint, Defendant

New York Life Insurance Company set up that the checks which it had issued to Appellant were in payment of the proceeds of two policies of life insurance issued by it to Edward N. Brown, in which Appellant was named beneficiary. After the issuance of the checks, Appellee, Federal Deposit Insurance Corporation (hereinafter called F.D.I.C.), notified the Defendant New York Life Insurance Company that it had information indicating that the money used to pay the premiums on the policies were funds of the Harney County National Bank of Burns, Burns, Oregon (hereinafter called the Bank). Defendant New York Life Insurance Company disclaimed any right or interest in or to the proceeds of the policies, paid the same into the registry of the Court and prayed that F.D.I.C. be made a party so that the claims of Appellant and F.D.I.C. to the proceeds of the policies might be determined.

After a pretrial conference, the Defendant New York Life Insurance Company was discharged from further liability and a trial was had upon the issues joined between Appellant and F.D.I.C., which resulted in the judgment which is the subject of this appeal.

Following the entry of judgment, Appellant filed a Motion for New Trial, which the court denied.

The action was properly filed in the District Court pursuant to Section 24 of the Judicial Code, as amended, (28 U.S.C.A., Section 41, subd. (1)).

Defendant New York Life Insurance Company was entitled to deposit the proceeds of the policies and to re-

quire Appellant and F.D.I.C. to litigate their claims to the fund under Section 24 of the Judicial Code, as amended, (28 U.S.C.A., Section 41, subd. (26)).

This appeal is taken from the judgment entered in the trial court and from the order denying Appellant's Motion for New Trial.

This court has jurisdiction of the appeal by virtue of Section 128 of the Judicial Code (28 U.S.C.A., Section 225), it being an appeal from final orders of the District Court, a direct review of which may not be had in the Supreme Court of the United States under Section 238 of the Judicial Code (28 U.S.C.A., Section 345).

STATEMENT OF THE CASE

The case was tried in the District Court upon an Agreed Statement of Facts, which is contained in the Pretrial Order.[1]

From the Agreed Statement, it appears that Appellant's son, Edward N. Brown, became connected with the Harney County National Bank of Burns, at Burns, Oregon, as a teller in 1927. He became assistant cashier on January 12, 1932.[2]

On November 27, 1935, he applied for and New York Life Insurance Company issued the policies of life insurance involved.[3]

On January 7, 1936, Brown was elected a Director of the Bank and on January 11, 1938, he was promoted to Vice President.[4]

Brown committed suicide on August 6, 1942, while the National Bank Examiners were making an examination of the Bank.[5] It was later found that he was short about $416,000.00.[6]

Brown paid all but one of the premiums on the policies by checks drawn on his accounts in the Bank. It was impossible to determine upon what bank the check in payment of the last premium was drawn.[7]

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1 R. 2-24.
2 R. 15.
3 R. 3.
4 R. 15.
5 R. 16.
6 R. 16 and 17.
7 R. 5 and 6.

Due proof of death of Brown was furnished to and received by New York Life Insurance Company and, by reason thereof, there became due and payable to Appellant, the beneficiary, the sum of $20,582.00.[8]

On or about August 18, 1942, New York Life Insurance Company issued and on August 21, 1942, it delivered to Appellant two checks whereby it directed the United States National Bank of Portland (Oregon) to pay to the order of Appellant the sum of $20,582.00.[9]

Appellant presented the checks to the United States National Bank for payment on September 4, 1942, and it failed and refused to pay Appellant any sum thereon and advised her that New York Life Insurance Company had previously countermanded payment thereof.[10].

Prior to September 4, 1942, when Appellant presented the checks for payment, F.D.I.C. had notified the New York Life Insurance Company that it had information indicating that the money used to pay the premiums on the policies were funds of the Harney County National Bank. This notification prompted the New York Life Insurance Company to stop payment on the checks.[11]

The balances in Brown's accounts at the time his checks in payment of the premiums were cleared through the Bank and the credits to his accounts which made up the various balances are all agreed upon.[12]

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8 R. 4.
9 R. 4.
10 R. 4.
11 R. 4 and 5.
12 R. 5-14.

The question of fact and issues of law which were to be determined by the trial court are clearly defined in the Pretrial Order.[13]

The cause was submitted on August 13, 1943, and briefs were then filed. On June 12, 1944, the court's decision was announced and on July 12, 1944, the opinion was filed.[14] Findings, Conclusions and Judgment were entered November 20, 1944.[15]

On November 28, 1944, Appellant filed her Motion for New Trial.[16] The Motion was argued January 8, 1945, and the Order Denying the Motion was entered January 31, 1945.[17]

Notice of Appeal from the Judgment and from the Order denying Appellant's Motion for New Trial was duly filed February 13, 1945.[18]

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13 R. 25-28.
14 R. 32-53.
15 R. 54-68.
16 R. 68-71.
17 R. 77.
18 R. 78.

SPECIFICATION OF ERROR I

THE TRIAL COURT ERRED IN CONCLUDING THAT F.D.I.C. SUCCEEDED TO OR BECAME SUBROGATED TO THE RIGHTS, IF ANY, OF THE HARNEY COUNTY NATIONAL BANK AGAINST THE PROCEEDS OF THE POLICIES.

(a) When F.D.I.C. made good the shortages in the depositors' accounts, the right of the Bank or of its depositors to pursue the claim against Brown's insurance was destroyed, otherwise a dual recovery would be permitted.

(b) After payment by F.D.I.C., there was in existence no enforceable claim against the insurance proceeds which the Bank could assign to F.D.I.C. and which would support a recovery in favor of F.D.I.C.

(c) F.D.I.C. has no right of subrogation.

(d) The assignment to it of the assets of the Bank or of the depositors' claims cannot assist it.

ARGUMENT

We contended in the trial court and we still insist that there is at the threshold an insuperable obstacle which defeats F.D.I.C.'s claim to the proceeds of the insurance policies.

The question is raised by the first Issue of Law contained in the Pretrial Order.[19] It is as follows:

> **"Whether Federal Deposit Insurance Corporation succeeded to or became subrogated to the Bank's rights, if any, as against the proceeds of the insurance policies upon the life of Edward N. Brown."**

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19 R. 26.

F.D.I.C., as its name implies, is a Government owned insurance company, engaged in the business of guaranteeing depositors' accounts in banks which pay to it annually a premium equal to 1/12 of 1% of the total deposit liability.[20]

It is admitted in this case that the Harney County National Bank had paid the necessary assessments or premiums so that its depositors' accounts were insured by the F.D.I.C.[21]

It is also conceded that F.D.I.C. made good the shortages which were discovered in the accounts of the depositors of the Harney County National Bank after Brown committed suicide.[22]

Appellant's contention that F.D.I.C. is in no position to assert the rights which might have been available to the depositors or the Bank except for its responding upon its obligation to make good the shortages in the depositors' accounts is founded upon the case of *American Surety Co. v. Bank of California,* 44 F. Supp. 81; affirmed 133 F. (2d) 160.

In that case Crowe wrongfully abstracted money from Interior's account at the Bank of California under such circumstances that the Bank was liable to Interior for its loss. Interior had a policy of insurance with American Surety Co. protecting it against Crowe's infidelity and it made a claim under the policy and the loss was made

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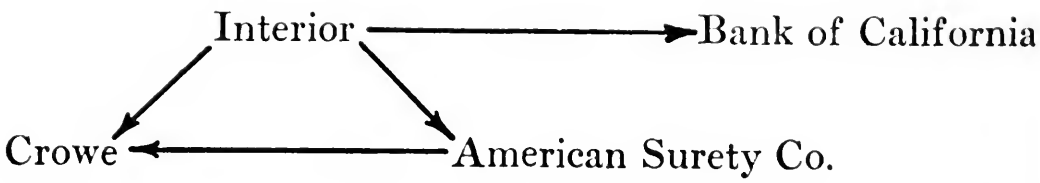
20 12 U. S. C. A., § 264 (1).
21 R. 16.
22 R. 14.

good. American Surety Co. took an assignment of Interior's claim against the Bank and attempted to recover on it against the Bank.

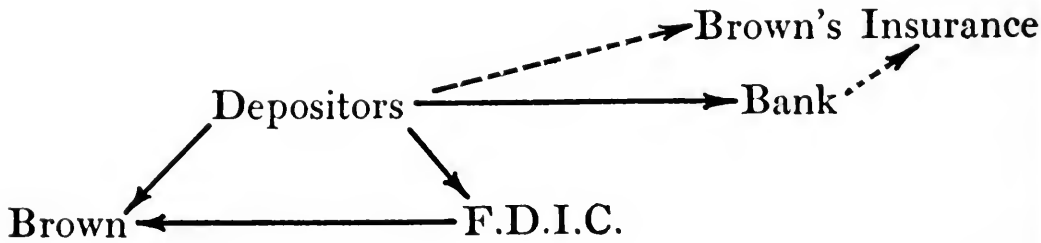
It was held that in responding on its policy the American Surety Co. merely did what it undertook to do for a consideration and therefore its payment discharged the debt and it could not aid its position or change the consequences by taking an assignment or anything else.

In our case here, it is claimed that Brown wrongfully abstracted money from depositors' accounts in the Harney County National Bank under such circumstances that the Bank was liable for the losses. F.D.I.C. had insured the depositors' accounts and it responded and has made good the shortages in the depositors' accounts, taking an assignment of the depositors' claims against the Bank. In this action F.D.I.C. is attempting to assert the remedy which the depositors and the Bank had to reach the proceeds of the policies on the life of the wrongdoer, and under the doctrine of the *American Surety Co.* case it must be held that when F.D.I.C. made good the shortages in the depositors' account that it merely did what it undertook to do for a consideration and therefore its payment discharged the debt and it can not aid its position or change the consequences by taking an assignment or anything else.

A diagram best demonstrates the applicability of the rule of the *American Surety Co.* case to the facts of this case.



Crowe, whose fidelity was insured by Interior with American Surety, wrongfully abstracted money from Interior's account under circumstances making the Bank of California liable for the loss. Interior therefore had a claim for its loss against Crowe, American Surety and the Bank. It called on the Surety Company to respond and it did so, taking an assignment of Interior's claim against the Bank. *Held* payment by the insurer extinguished the debt and it could not recover over against the Bank either by virtue of the assignment or subrogation.



Brown wrongfully abstracted money from depositors' accounts which were insured by F.D.I.C. under circumstances making the Bank liable for the loss. Depositors therefore had a claim against Brown, F.D.I.C. and the Bank. Depositors called upon F.D.I.C. to respond and it did so, taking an assignment of depositors' claims against the Bank. It must be held that payment by the insurer extinguished the debt so that it does not hold by reason of

assignment or subrogation any rights which the depositors or the Bank might have had over against Brown's Insurance but for its payment of the claims.

In the trial court, F.D.I.C.'s counsel argued that the *American Surety Co.* case was not applicable because:

1. F.D.I.C. was the owner by assignment of the Bank's claim against the insurance,
2. F.D.I.C. was seeking to enforce a property right assigned to it by the Bank,
3. If F.D.I.C. claimed by reason of subrogation, Appellant was no better off than her son—the wrongdoer,
4. As subrogee it had a right to recover the Bank's property as against Appellant, who paid nothing to become the beneficiary,
5. Edward N. Brown was the wrongdoer and Appellant claimed only through him.

Not one of the five reasons assigned is adequate by itself or in combination with any or all of the others to distinguish the case.

F.D.I.C. says it is the owner by assignment of the Bank's claim (Reasons 1 and 2 above). However, the F.D.I.C.—being an insurer for a consideration—by making good the shortages, destroyed the Bank's and the depositors' claims against Brown's life insurance—witness the following language from the *American Surety Co.* opinion (pp. 164 and 165 of 133 F. (2d)):

> "When Insurers (F.D.I.C.) paid Interior (made good the shortages in the depositors' accounts), the

right of Interior (the Bank or the depositors) to pursue its claim against Bank (the depositor against the Bank; the Bank against Brown's insurance) was destroyed as Interior (the depositors or the Bank) would not be permitted a dual recovery. Therefore, there was in existence no enforceable claim against Bank (the depositors against the Bank; the Bank against Brown's insurance) which Interior (the depositors or the Bank) could assign to Insurers (F.D.I.C.), and which would support recovery in favor of Insurers (F.D.I.C.). * * * That Oregon law follows the rule stated is evident in American Central Ins. Co. v. Weller, 106 Or. 494, 212 P. 803, where the court held, as already mentioned in connection with this case, that payment by the insurer (F.D.I.C.) on the insurance policy (12 U.S.C.A., Sec. 264 (1)) satisfied the debt involved, and concluded that the debt could not be assigned.

"Insurers (F.D.I.C.) have no right of subrogation. The assignment to them of Interior's (the depositors' claim against the Bank; the Bank's claim against Brown's insurance) cause of action against the Bank (the depositors' claim against the Bank; the Bank's claim against Brown's insurance) cannot assist them."

F.D.I.C. says if it must rely on subrogation that its rights are superior to Appellant's since she claims only through the wrongdoer (Reasons 3, 4 and 5 above). However, Appellant does not claim through the wrongdoer but under solemn contracts in which she was designated the beneficiary and it cannot be claimed that she had either actual or constructive notice of her son's wrongdoing.

The equities are in her favor as against an insurer for a consideration—witness the following statements from the *American Surety Co.* opinion (pp. 162, 163 and 164 of 133 F. (2d)):

> "The right of subrogation is a creature of equity, applicable where one person is required to pay a debt for which another is primarily responsible, and which the latter should in equity discharge. In theory one person is substituted to the claim of another, but only when the equities as between the parties preponderate in favor of the plaintiff. * * * A surety may pursue the independent right of action of the original creditor against a third person, but it must appear that said third person participated in the wrongful act involved or that he was negligent, for the right to recover from a third person is merely conditional in contrast to the right to recover from the principal which is absolute. The equities of the one asking for subrogation must be superior to those of his adversary. If the equities are equal or if the defendant has the greater equity, subrogation will not be applied to shift the loss.
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> * * *
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> "In the instant case the surety contracts are confined to Insurers and Interior. Any right of recovery against third parties for money paid Interior by Insurers under the contracts must rest solely upon a weighing of the equities as between the third parties and Insurers. Such equities generally depend upon participation in wrongdoing, negligence, or knowledge, although we do not mean to say that these expressions cover the gamut of equities which may or should be considered.
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> * * *
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> "In all of the situations outlined defendants had

actual knowledge of facts sufficient to put them on notice of the wrongdoing and in a way, therefore, were implicated in the wrong done. * * * No indication is found that Bank knew any facts which would suggest the fraud of an employee of its depositor. Insurers, on the other hand, expressly contracted to secure Interior against losses caused by a dishonest employee, such as Crowe. They accepted the responsibility for such losses for a compensation, the premiums paid to them, which they have retained. Both they and Bank are innocent of any wrongdoing, although all were liable to Interior (under assumption of Bank's liability to Interior) on the basis of independent contract obligations—the implied contract of Bank to pay only to those entitled, and the contracts of Insurers to indemnify against losses caused by a defalcating employee. Since Insurers expressly, voluntarily and for a compensation guaranteed against loss in the exact situation involved, the equity in the situation cannot lie in favor of Insurers and against Bank for the payment made."

This issue was disposed of by the trial court in these words:[23]

"Finally, it is objected that no matter what were the rights of the bank, the intervenor could not succeed to them because, having assumed the deposit liability of the bank the obligation was thus satisfied. It is assumed that this objection can be based upon American Surety Company vs. Bank of California, decided by this court in an opinion reported in 44 F. Supp. 81, and affirmed by the Circuit Court of Appeals for the Ninth Circuit in an opinion reported in 133 F. (2d) 160. The confusion of plaintiff seems to arise from the fact that no account is taken of the

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[23] R. 52 and 53.

specific contract made in these two cases. The American Surety Company had there become responsible for the fidelity of the embezzler and when the proceeds of the wrongdoing were replaced, the obligation was completely satisfied. Here, the Federal Deposit Insurance Corporation was under duty simply to replace the assets, no matter how the loss occurred. It has no specific responsibility for the fidelity of Brown. When it carried out the obligation to replace the assets lost, it acquired the right of the bank against the wrongdoer. Both these cases are ruled by Oregon decisions. The American Surety Company case is governed by the opinion in the case of American Central Insurance Company vs. Weller, 106 Oregon 494. This case, on the other hand, is governed by the Jansen case above cited."

While it is perhaps unimportant, it should be noted that the trial court misstated the issue to be decided.

No one contends and it is not the fact that F.I.D.C. "assumed the deposit liability of the bank".

According to the admitted facts, F.D.I.C. merely replaced the shortages in the depositors' accounts.[24]

The trial court attempted to distinguish the *American Surety Co.* case on the ground that the obligation assumed by F.D.I.C. was different from that assumed by the Surety Company.

There is no distinction in the liability assumed if

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[24] R. 14.

F.D.I.C.'s obligation and what it actually did according to the admitted facts is correctly stated.

American Surety Co. agreed to make good a shortage due to an employee's infidelity. F.D.I.C. agreed to make good a shortage whether due to an employee's infidelity or merely to bad judgment. F.D.I.C.'s obligation was greater than the Surety Company's but what it was called on to do in this case was to fulfill the identical obligation which the Surety Company assumed in the *American Surety Co.* case.

Here F.D.I.C. made good the shortage due to the employee's infidelity. In the *American Surety Co.* case the Surety Company made good the shortage due to the employee's infidelity.

F. D. I. C., by so responding, can acquire no better standing than American Surety Co. did when it responded in identically the same way.

In the concluding sentences of its opinion on this point, the trial court says:[25]

> "The American Surety Company case is governed by the opinion in the case of American Central Insurance Company vs. Weller, 106 Oregon 494. This case, on the other hand, is governed by the Jansen case above cited."

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[25] R. 53.

The *Jansen* case referred to is *Jansen v. Tyler*, 151 Ore. 268, 47 P. (2d) 969, 49 P. (2d) 372, which merely holds that where an employee embezzles funds and uses them to pay life insurance premiums, the employer may claim the proceeds of the policies to the extent that embezzled funds were used to pay the premiums. The *Jansen* case is not concerned with a third party attempting, by virtue of assignment or subrogation, to assert the right of the one whose funds were stolen. It has no bearing upon the right of F.D.I.C. or of American Surety Co. to assert the right of the victim after the loss has been made good.

The *American Surety Co.* case is controlling and it must be held that F.D.I.C. has no claim to the proceeds of the policies. A judgment awarding all of the proceeds of the policies to Appellant should be entered.

SPECIFICATION OF ERROR II

THE TRIAL COURT ERRED IN FINDING AND CONCLUDING THAT F.D.I.C. WAS ENTITLED TO ANY OF THE PROCEEDS OF THE POLICIES.

(a) Since the controlling facts were stipulated, the ordinary rule that the trial court's findings will not be reviewed is without application and this court is free to reach its own conclusion untrammeled by the District Court's Findings and Conclusions.

(b) The sole question for determination is whether the premiums were paid with funds wrongfully embezzled or misappropriated from the Bank.

(c) The trial court found and concluded that embezzled funds were not traced into Brown's accounts or into the premium payments.

(d) The trial court held and it is the law that unless the stolen funds can be directly traced into the insurance premiums, there can be no recovery by or on behalf of the Bank.

(e) The moneys drawn by Brown as salary were not embezzled funds.

(f) There is no such thing as an automatic setoff which would extinguish the balances in Brown's accounts when the premium checks cleared.

(g) The burden of proving that embezzled funds went into the payment of the premiums was on F.D.I.C.

(h) Since Brown had other sources of income and the exact items of credit making up the balances in his accounts have been agreed upon, it cannot be found or concluded that the funds in his accounts were embezzled.

(i) If commingling be assumed, since Brown's own funds were more than sufficient to pay each of the premiums when the checks cleared, Appellant is entitled to prevail.

(j) The admitted facts compel the conclusion that Appellant is entitled to prevail.

ARGUMENT

(a) Since the controlling facts were stipulated, the ordinary rule that the trial court's findings will not be reviewed is without application and this court is free to reach its own conclusion untrammeled by the District Court's Findings and Conclusions.

Since the controlling facts have been agreed upon and are contained in the Pretrial Order,[26] the ordinary rule that an appellate court will accept the trial court's findings of fact, where it saw the witnesses and observed their demeanor, is without application.[27]

The facts having been stipulated, this court on this appeal is free to reach its own conclusion untrammeled by the district court's findings and conclusions.[28]

(b) The sole question for determination is whether the premiums were paid with funds wrongfully embezzled or misappropriated from the Bank.

Assuming the first Issue of Law framed in the Pretrial Order (which raises the question as to F.D.I.C.'s right to claim the proceeds of the policy as assignee or by way of subrogation) is decided against Appellant—the possibility of which assumption we expressly deny—it will then become necessary for the court to decide the remaining Issues of Law.

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26 R. 3-16.

27 British American Assur. Co. v. Bowen (C.C.A. 10th), 134 F. (2d) 256, 260.

28 Wigginton v. Order of United Commercial Travelers of America (C.C.A. 7th), 126 F. (2d) 659, 661, certiorari denied 317 U. S. 636, 87 L. ed. 513, 63 S. Ct. 28. See also Cyclopedia of Federal Procedure (2d ed.), Vol. 12, § 6211, p. 268.

The second Issue of Law is as follows:[29]

> **"Whether the various premium payments were paid with funds belonging to Edward N. Brown or with funds wrongfully embezzled or misappropriated from the Harney County National Bank of Burns, Burns, Oregon."**

This question is one of law because all of the facts with regard to the balances in Brown's accounts at the time the premium checks cleared and the items of credit making up the balances have been agreed upon.[30]

(c) The trial court found and concluded that embezzled funds were not traced into Brown's accounts or into the premium payments.

No evidence was offered and none exists to show that any of the stolen funds went into Brown's bank accounts against which the premium checks were drawn.

The trial court, in its opinion, made it clear that there is no evidence that the embezzled funds went into Brown's accounts, in the following words:[31]

> "The cardinal factor is, that no item of the embezzled funds is traced directly into the premiums of the insurance policies, nor into the bank accounts, which Brown maintained with the Harney County National Bank."

(d) The trial court held and it is the law that unless the stolen funds can be directly traced into the insurance premiums, there can be no recovery by or on behalf of the Bank.

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29 R. 26.

30 Baer v. Lorimer (Cal. 1934), 28 P. (2d) 909, 910. See also Wigginton v. Order of United Commercial Travelers (C.C.A. 7th), 126 F. (2d) 659, 661, certiorari denied 317 U. S. 636, 87 L. ed. 513, 63 S. Ct. 28.

31 R. 35.

In the trial court, we contended that before F.D.I.C. could share in the proceeds of the policies it would have to be proven that the stolen funds entered Brown's various accounts.

The law on this point is clear[32] and the trial court held correctly that the stolen funds must be traced into Brown's accounts before F.D.I.C. can prevail.

Witness this paragraph of the court's opinion:[33]

> "It is, however, established that there was a confidential relationship and a breach thereof. But according to the definition of a constructive trust, property must pass into the hands of the persons upon whom the courts impose it, or by his machinations, into the hands of third parties in order to lay a basis for recovery. There is no doubt that upon the discovery that the funds had been stolen, the bank could have recovered from Brown in some of the forms of assumpsit or debt, but UNDER THE DOCTRINES OF RESTITUTION IT COULD NOT RECOVER SPECIFIC PROPERTY FROM HIM, OR FROM A THIRD PARTY, UNLESS IT COULD BE PROVEN THAT THE FUNDS SO ABSTRACTED FROM THE BANK WERE INCLUDED THEREIN, OR WERE PART OF THE PURCHASE PRICE THEREOF. THEREFORE, UNLESS THE STOLEN FUNDS COULD BE DIRECTLY TRACED INTO SPECIFIC ARTICLES OF PROPERTY, OR INTO LIFE INSURANCE PREMIUMS, THERE COULD

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32 Picciano v. Miller (Idaho 1943), 137 P. (2d) 788, 790, 791; Bogert, Trusts and Trustees, Vol. 4, § 921, p. 2651; Restatement, Trusts, § 202; Restatement, Restitution, §§ 205, 215.

33 R. 42 and 43.

BE NO RECOVERY BY THE BANK OF THE ARTICLES OR PROCEEDS OF THE POLICIES, NOTWITHSTANDING THE IMMORAL AND ILLEGAL OPERATIONS OF BROWN AND THE GREAT LOSS CAUSED TO THE BANK THEREBY."

Since the stolen funds were not traced into Brown's bank accounts out of which the premiums were paid—and the trial court so held[34]—all of the proceeds of the policies should have been awarded to Appellant.

(e) The moneys drawn by Brown as salary were not embezzled funds.

Under the admitted facts, several premium payments on the policies were made in whole or in part with funds Brown had drawn as salary.[35]

Legal issues III, IV and V, stated in the Pretrial Order,[36] raise the question whether Appellant or F.D.I.C. is entitled to claim the benefit of the premium payments so made.

"III

"Are the items of deposit which are constituted by salary paid by the Bank to Brown and placed in his account, moneys belonging to Brown which constitute an actual credit to the account?

IV

"If Brown, at the time of drawing said salaries, was guilty of embezzlement, misappropriations, defalcations

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34 See page 20 herein.

35 R. 6-13, paragraphs X, XI, XII, XIII, XV, XVI, XVII and XVIII.

36 R. 26 and 27.

or other breach of trust in his dealings with the Bank, was he entitled to any compensation from the Bank?

V

"If it be held that Brown was not entitled to any compensation from the Bank, were the funds that he drew as compensation funds wrongfully embezzled, misappropriated or converted from the Bank?"

F.D.I.C. contended below that Brown was not entitled to draw any salary because of his infidelity.

Appellant contended and now insists that the question is not whether he was entitled to draw his salary—the fact remains that he did. The question is whether the funds so drawn were "funds wrongfully embezzled or misappropriated from the bank". If they were not—regardless of whether he was entitled to draw his salary by reason of his infidelity—Appellant is entitled to the benefit of the payments so made.

We have found no case holding that one from whom money is embezzled is entitled to claim the benefit of premium payments made with money drawn as salary.

One of the leading cases in which one from whom money was embezzled sought to invoke the remedy of following the embezzled funds into the premiums and then into the proceeds of the policy is *Truelsch v. Northwestern Mutual Life Insurance Company,* 38 A.L.R. 914, 186 Wis. 239, 202 N.W. 352.

In that case the wrongdoer's salary was paid over to his wife and she used it to run the home. The money used to pay the premiums was definitely shown to have been

embezzled and the court rightly held that the employer was entitled to enforce a trust on the proceeds of the policy to the extent that his funds could be traced into it. While the exact point with which we are here concerned is not mentioned by the court, there is a clear implication to the effect that had the premiums been paid from the employee's salary that the employer would not have been entitled to prevail.

It may be conceded that there are many cases holding that a corporate officer or agent who is guilty of embezzlement, fraud, mismanagement or gross neglect is not entitled to claim or sue for his stipulated salary.[37]

But before F.D.I.C. is entitled to the benefit of any premiums paid, it must be shown that the money used to pay them was "wrongfully embezzled or misappropriated" from the Harney County National Bank.[38]

The sums which Brown drew as salary *were drawn with the knowledge, consent and approval of the Bank.*[39]

Under no possible theory could it be held that funds so acquired were "wrongfully embezzled or misappropriated" from the Bank.

In *Sweet v. Lang* (C.C.A. 8th), 14 F. (2d) 762, it is held that a receiver acquires no interest in a policy on the life of an officer, payable to his wife or estate, the premiums on which were paid with company funds, when the corporation knew of and ratified the payments.

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37 See 5 Fletcher on Corporations, Perm. ed., § 2145, p. 462.
38 R. 26—Issue of Law II.
39 R. 15 and 16—Pretrial Order Paragraph XXII.

In *Oliver v. Northwestern Mutual Life Ins. Co.*, (D. C. Pa.), 2 F. Supp. 266, it is held that where premiums are paid with company funds drawn with the consent of the stockholders and directors that there is no breach of trust sufficient to permit a receiver to recover the premiums.

Funds drawn by Brown as salary were no more "embezzled funds" than money regularly borrowed from a bank and it has never been held that a lender can follow money borrowed to pay premiums into the proceeds of the policy.

In *Jansen v. Tyler,* 151 Ore. 268, 47 P. (2d) 969, 49 P. (2d) 372, the Oregon Supreme Court established the rule under which F.D.I.C. (if it should prove that Brown paid the premiums with funds or property embezzled, misappropriated or wrongfully converted from the Bank,) would be entitled to that proportion of the proceeds of the policies which the premiums paid with stolen funds bear to the total premiums paid.[40] In that case it was held that Tyler paid the first 3 premium payments upon the policies involved with company funds. The balance of the premium payments were held to have been made with Tyler's own funds. Tyler's embezzlements and misappropriations were at all times in a very large amount and at the time of his death he had overdrawn his salary account by at least $5,000.00. Unquestionably, some of the premium payments which were held to have been made with Tyler's own funds were paid with funds which he

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[40] R. 28—paragraph XI.

drew from his salary account, either as salary or overdraft, but they were still held to have been paid with Tyler's funds and not with the corporation's.

Clearly the salary items are not "embezzled funds" so that F.D.I.C. cannot benefit from the payments made with them.

(f) There is no such thing as an automatic setoff which would extinguish the balances in Brown's accounts when the premium checks cleared.

Since the stolen funds were not and cannot be traced into Brown's bank accounts and since the salary items are not "embezzled funds", F. D. I. C. conjured up a theory to destroy the balances in Brown's accounts when the premium checks cleared in an attempt to prevent Appellant from recovering.

F.D.I.C.'s theory (which the trial court followed) is that of automatic setoff.

Issues of Law VII and VIII are as follows:[41]

> **"Does the fact that Brown embezzled and misappropriated or wrongfully converted moneys, funds or property belonging to the Bank automatically extinguish, without a charge or set off by the Bank, any items of deposit of his own funds in any account upon which checks in payment of premiums were drawn?"**
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> **"If it be found that Brown had embezzled, misappropriated or wrongfully converted funds or property**

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[41] R. 27 and 28.

of the Bank, exceeding the amount of any items of deposit in his accounts, at or before the time of the charging of any check for premiums, whatever may have been the source of such items, is the Defendant entitled to the benefit of the premium payment so made?"

In the trial court, F.D.I.C. contended that even though it be held that Brown's salary and the other items credited to his account are "his funds", as distinguished from moneys "embezzled" from the Bank, that there never were any actual balances in any of his accounts because at all times his embezzlements exceeded any balances which might otherwise exist.

It is Appellant's contention that the balance in any or all of Brown's accounts can not be extinguished as of a long past date, by merely showing that he had at all times embezzled more than his balances.

In *American National Bank v. King,* 158 Okla. 278, 13 P. (2d) 164, King, while cashier and president of the bank, embezzled and misappropriated large sums of money—exceeding at all times the balance in his account at the bank. During the period when he was a defaulter, he took out insurance on his life in favor of his wife and family. King committed suicide and the embezzlements were discovered. Thereafter the Bank brought action to share in the proceeds of the policy to the extent that the premiums were paid from funds of the bank. It was contended that while the premiums were paid by checks drawn on King's personal account, that there never was any actual balance in his favor because at all times he had

embezzled far more than the balance shown in his account. The trial court and the Oklahoma Supreme Court refused to follow the Bank's theory (which is identical with that asserted here by F.D.I.C.) and held that the balance in King's account could not be so extinguished.

Another case which is helpful as showing that there can be no such thing as a retroactive automatic setoff is the case of *Duke v. Johnson,* 127 Wash. 601, 221 Pac. 321. In that case Johnson bought shares in the bank under an agreement with Larson that he (Larson) would repurchase them if Johnson at any time wished to return them. Johnson, while Vice President and Director of the bank, called upon Larson to repurchase the stock, which was done by the delivery to Johnson of a cashier's check which was subsequently charged by Larson to the personal account in the bank of one Lindeberg, who owned most of the stock of the bank. Shortly after the check was paid the bank was found to be insolvent and the plaintiff—the State Supervisor of Banking—took charge. The Supervisor brought action to recover from Johnson the amount of the check issued in repurchase of his stock, which was charged to Lindeberg's account, on the theory that he (Johnson) wrongfully took the bank's assets while Vice President and a Director thereof. The trial court decided against the Supervisor and he appealed. In affirming the judgment, the Supreme Court of Washington said (p. 322 of 221 Pac.):

> "The appellant further contends that the credit to Lindeberg's account as shown on the books of the bank was fictitious rather than real. This claim is

> founded on the fact that the bank then held Lindeberg's obligations for an amount possibly in excess of his checking account. *But the bank had not then attempted to exercise a right of set-off, even conceding it had such right.* It then recognized the account as a checking account, and as long as it did so, Lindeberg or his authorized agent were privileged to draw checks thereon."

Another case in point is *Peoples State Bank v. Caterpillar Tractor Co.*, 12 N.E. (2d) 123. In that case the Tractor Company sold a tractor to its dealer on a conditional sales contract and took an assignment of the purchase order which the dealer held and all moneys due under it. The dealer delivered the machine to the customer, collected the funds and deposited them in its bank account. The dealer then drew a check for a part of the amount due on the conditional sales contract in the Tractor Company's favor and the bank then set off its claim against the dealer on a past due note and dishonored the Tractor Company's demand for the funds due it on the sale of the tractor. Reversing the trial court, the Supreme Court of Indiana said (p. 126 of 12 N.E. (2d)):

> "A deposit in bank creates a relationship of creditor and debtor between the bank and the depositor, and the bank has the right at its option to set off its indebtedness to the depositor against any debt which may be due from the depositor to the bank. *But, until the bank elects to set off, any one in favor of whom checks are drawn and paid takes the funds free of any claim by the bank.* * * * The rights of the parties therefore must be determined as of the time when the appellant elected to exercise its right to set-off."

It will thus be seen that no retroactive automatic setoff can be claimed in order to avoid the effect of past completed transactions.

In the trial court, counsel for F.D.I.C. did not contend that the case of *McConnell v. Henochsberg,* 11 Tenn. Appeals 176, supported their theory of automatic setoff but it was cited to support the following proposition of law:

> "A constructive trust is created, arising *ex maleficio* out of the fraud and dishonest conduct of one who purchases for himself with the funds of another."

The trial court adopted F.D.I.C.'s theory of automatic setoff and as supporting authority placed its decision solely and squarely upon *McConnell v. Henochsberg.*

The trial court said:[42]

> "The result is, that the Tennessee case (McConnell v. Henochsberg) is the only reasoned case upon this particular set of circumstances. Inasmuch as this decision squares with correct doctrine, as indicated by the previous discussion, it will be followed upon this point. All the money paid out upon checks issued by Brown against his paper accounts, belonged to the bank."

An analysis of the *McConnell* case shows that (1) it is not in point on the facts, (2) it was decided in 1929 by an intermediate appellate court in Tennessee, (3) while

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[42] R. 49.

there have been literally thousands of cases on the subject of tracing stolen funds into insurance premiums, *it has never once been cited or followed,* and (4) it does not support the theory of automatic setoff.

In the *McConnell* case H was teller and assistant cashier in a bank in Memphis. During an examination of the bank by the State Bank Examiners a shortage was discovered. H thereafter confessed his guilt and took his life. The bank thereupon closed its doors and was taken over by the superintendent of banks. An audit revealed that H was $329,591.75 short. The auditors were able to reconstruct H's transactions so as to show his methods of withdrawals and concealment. At the time of H's death, there was in force a considerable amount of life insurance payable to his wife, son and daughter. One-third of the insurance was taken out prior to 1920 and all premium payments made prior to that date were paid with H's own funds. H maintained six accounts in the bank and all premium payments subsequent to 1920 were made from these accounts. While H's salary was $300.00 to $350.00 per month (which he deposited in these six accounts) in the seven years following 1920 he ran through his accounts over $116,000.00. *A very considerable part of the deposits entering H's accounts were made from funds stolen from the bank.* While H had outside enterprises, all were unprofitable except one on which he made approximately $1,000.00. By his own confession H lost large sums in gambling over a period of years. *The auditors, by an analysis of H's six bank accounts, demonstrated that all*

premiums paid on the life insurance policies subsequent to 1920 *were made out of funds embezzled from the bank.* H had sources other than his salary and funds stolen from the bank "but the amounts received from these sources are insignificant".

Upon this evidence, the trial court held that the superintendent of banks was entitled to all the proceeds realized from the insurance upon H's life which was taken out subsequent to 1920 and to a proportionate part of the funds paid upon the policies taken out before 1920 in the ratio that the premiums paid subsequent to 1920 bore to those paid by H prior to 1920.

The beneficiaries appealed, contending (1) no precedent in Tennessee warranted the imposition of a constructive trust upon the proceeds of insurance policies, the premiums on which were paid wholly or partly with embezzled funds, (2) the beneficiaries acquired a vested property right in the policies upon payment of the initial premiums, (3) the imposition of a constructive trust never follows the mere showing of misappropriations, (4) trust funds could not be held to reappear in H's accounts when new deposits were made after complete exhaustion thereof, (5) the burden was on the superintendent of banks to clearly and definitely trace the trust funds into and out of H's accounts and into the premiums paid, and (6) since other funds were available for payment of premiums there was no presumption that they were paid out of embezzled funds.

Points 1 and 2 were disposed of by following cases from other jurisdictions, among them ***Truelsch v. North-***

western Mutual Life Insurance Company[43] and *Vorlander v. Keyes,*[44] which establish the rule which is conceded in this case.[45]

Points 3, 4 and 5 are disposed of by the court in the following language:

> "* * *, *no constructive trust can be impressed upon property unless the misappropriated fund is traced into the property sought to be impressed with the trust.*
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> "It is urgently insisted in this case by appellants that the complainant has failed to show by satisfactory or sufficient evidence that any part of the funds stolen by Henochsberg from the bank went into any of the property, the life insurance involved, the Hein Park property, and the other property involved in this case, and that without a sufficient tracing of the misappropriated or stolen funds into this property that there can be no constructive trust in favor of the bank.
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> "There can be no question, but that the stolen funds must be traced into the property sought to be impressed with the constructive trust. This principle has been recognized by the courts and textwriters with practical unanimity.
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> * * *
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> "Appellee concedes that the rule is as above stated, but insists that complainant has shown by proof that the property sought to be impressed with a constructive trust in this case, including the insurance premiums, was purchased with funds stolen from the bank, and *that the stolen funds have been definitely traced into the payment of the insurance pre-*

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43 38 A.L.R. 914, 186 Wis. 239, 202 N.W. 352.

44 1 F. (2d) 67.

45 R. 28 and 29—Pretrial Order Paragraph XI.

miums and the purchase of the other property, except insurance premiums paid on the policies issued prior to January 1, 1920.

"* * * *Not all of this money so stolen by Henochsberg was passed through his various bank accounts, but it is evident that several thousand dollars of this stolen money was used by Henochsberg and did actually pass through his bank accounts in the American Savings Bank & Trust Company.* His salary during this period, a part of the time, was $300 per month, and a part of the time $350 per month, and while he had some other business connections during this period, *it is clearly apparent from the record that his earnings from such sources were comparatively insignificant.* His bank accounts showed deposits several times larger than any source of income that he had during this period. *The checks drawn by Henochsberg and his wife on his accounts at the bank exceeded greatly any legitimate deposits made by him to these accounts.* It is true that at no time during this period did his bank accounts reflect any considerable balance to his credit, and it is also true that on certain dates approximating the dates on which checks were given for insurance premiums, that his bank accounts would show small overdrafts. *It would appear,* and we think with sufficient definiteness, *that Henochsberg employed a system of feeding into his bank accounts stolen moneys from the bank, from time to time, a sufficient amount to have his accounts show only small balances on any given date to his credit,* and that this was one of the methods employed by him to deceive the bank officials, or to prevent suspicion. *But it is clearly apparent* from the record *that checks issued by him in payment of the life insurance premiums* after January 1, 1920, and in payment of the other investments, and payments on the other property sought to be impressed with a trust herein,

were paid out of moneys which did not belong to him, and that he had so mingled the stolen moneys with his own funds in the bank accounts as to make it impossible to actually ear-mark the stolen moneys as having been used exclusively in paying the life insurance premiums and the payments on the other property involved."

The climax of the Court's holding is expressed in the following paragraph on pages 197 and 198 of the opinion:

"While recognizing the settled rule that the misappropriated funds must be traced into the specific property before there can be a constructive trust impressed, we are of the opinion that where the trustee ex maleficio has pursued a systematic scheme and plan of stealing funds from the bank, where he sustains the fiduciary relation of assistant cashier and has direct supervision of the accounting department of the bank and abuses the confidence of the employers of the bank, and by the method employed uses the stolen funds taken by him from the deposits of customers, and *at such times as it becomes necessary and expedient feeds a sufficient amount of the stolen funds into his own bank account to protect checks drawn by him on his accounts in the payment of life insurance premiums* and payments on the other property sought to be impressed with the trust, that it constitutes such a tracing of the stolen funds into this property as to meet the exactions of the law with reference to impressing such property with a constructive trust."

The distinction between the case at bar and *McConnell v. Henochsberg* is clear and unmistakable.

First, The funds which H embezzled were definitely traced into the accounts from which the premiums were paid. *Second,* H had no funds of his own from which the premiums could have been paid.

Here (a) there has been a complete failure to prove that *any* embezzled funds went into the accounts from which the premiums were paid, (b) Brown had ample funds of his own from which to pay the premiums,[46] and (c) *the exact items credited to his accounts, when the checks in payment of premiums were cleared, have been agreed upon, and it is not even claimed that any of them are "embezzled funds".* In any event, at all times there was sufficient of Brown's own funds in the accounts to pay the premium checks.

If it were the fact (and it is not) that Brown placed "embezzled funds" in his accounts, we may rest assured that F.D.I.C.'s auditors would have compiled and there would have been introduced in evidence a chart or summary tracing the amounts withheld from depositors' accounts into his bank accounts.

That this is not the fact is best established by the Agreed Facts which show the various credits to Brown's accounts when the premium checks cleared. In every instance[47] the credits to his accounts are either salary or amounts received by him from outside sources. In not one

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[46] R. 19-24.

[47] R. 6-14—paragraphs X to XIX.

single instance is it claimed that any credit is either "embezzled funds" or the proceeds of embezzled funds.

Obviously, *McConnell v. Henochsberg* is not in point. The proof which was relied upon by the court in finding that Henochsberg paid the premiums with embezzled funds was positive and convincing. Here there is a total absence of proof that *any* "embezzled funds" went into Brown's accounts. The facts agreed upon in the Pretrial Order with respect to the items of credit in the accounts when the premium checks cleared repel and make impossible a finding or conclusion that the accounts then contained "embezzled funds".

(g) The burden of proving that embezzled funds went into the payment of the premiums was on F.D.I.C.

Issues of Law VI and IX[48] present the question of "Burden of Proof".

"VI

"Must the Federal Deposit Insurance Corporation show that any particular item of deposit in Brown's account was embezzled or the proceeds of embezzled funds or property before it is entitled to the benefit of any particular premium payment or is it entitled to the benefit of any and all premium payments unless Plaintiff shows that any particular items deposited in Brown's account in fact belonged to Brown and were not embezzled from the Bank or the proceeds of embezzled funds?"

"IX

"If no evidence appears as to the source of funds

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48 R. 27 and 28.

used in payment of the last premium, who is entitled to the benefit of that premium payment?"

Appellant contends that the burden of proving that the premiums were paid with money "embezzled or wrongfully misappropriated" from the Bank is on the F.D.I.C. throughout the case.

Appellant further contends that under Oregon law, which governs this case, the proof that embezzled funds went into Brown's accounts and from them into the premium payments must be strong, clear, convincing and indubitable.

The trial court's own declaration[49] that the proof failed to show that any of the stolen funds found their way into Brown's accounts or into the premiums should end the case.

F.D.I.C.'s theory, as it was expressed in the trial court, was that since under the stipulated evidence it can be taken as admitted that Brown did embezzle sums exceeding the balances in his accounts, F.D.I.C. is entitled to the benefit of all premium payments because Appellant has not shown that the funds in his accounts were not embezzled or wrongfully appropriated from the Bank.

In other words, F.D.I.C. says it is entitled to the benefit of all payments, in view of the defalcations of Brown, unless the innocent beneficiary can establish to the court's

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[49] R. 35 and see page 20 herein.

satisfaction that her son's own individual funds and not embezzled funds were used to pay the premiums.

A mere statement of the rule contended for by F.D.I.C. brands it as foreign to our conception of fairness and justice.

One might as well contend that an accused criminal is presumed guilty until proven innocent.

We believe the law to be that Appellant is entitled to the proceeds of the policies in which she was designated beneficiary irrespective of the source of the funds which were used to pay the premiums—save only the exception that she may be deprived of the proceeds if her son embezzled or stole the money which he used to pay the premiums. One who claims that the premiums were paid with money embezzled or stolen from him must prove it. His proof need not be conclusive. It need not be direct but may be circumstantial. But it must be satisfactory and sufficient to satisfy one with an open mind of the probability that stolen or embezzled funds were actually used to pay the premiums.

All the texts and cases we have been able to find support Appellant's view on this question.

In 65 C.J. 1055, Trusts, § 985, it is said:

> "In an action to follow trust property and to enforce the trust thereon, the burden of proof in the first instance is on the cestui que trust to trace and identify his property either in its original or substituted form. Similarly, where the beneficiary claims that trust

> moneys have become mingled with other funds by the trustee, he has the onus of tracing such moneys into the funds. No presumption arises that a payment for property by a trustee was made with trust funds. * * * There is no presumption that trust moneys in the hands of a fiduciary for many years and undisposed of are a part of his estate."

As is said in Scott on Trusts, Vol. III, § 508.4, at p. 2445, n. 7:

> "The claimant seeking to follow his money into the proceeds and to enforce a constructive trust or equitable lien has the burden of proving that his money was in fact used in the payment of premiums upon the policy."

The following appears in Bogert, Trusts and Trustees, Vol. 4, § 921, pp. 2653-6:

> "Most American courts have recognized this elementary conception with regard to the remedy of tracing, and have insisted that the cestui or successor trustee who is seeking to follow trust funds should convince the court that the bonds, bank accounts, stock, realty, or other property, which the complainant desires to take from the hands of a defaulting trustee or another not a bona fide purchaser, either is part or all of the original trust property, or is property which has been produced by the original trust res through sale, barter, reinvestment, or some other process.
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> "This majority view denies the remedy of tracing where the proof of the cestui claimant merely shows

the receipt of trust property by the defendant and makes no case as to its subsequent history or its existence among the present assets of the defendant, and also where the evidence shows that the trust property has been disposed of in such a way as to leave no product."

Not only is the burden of proof upon F.D.I.C. but the proof offered must be strong, clear, convincing and indubitable.

In *Barger v. Barger,* 30 Ore. 268, 47 Pac. 702, the Supreme Court of Oregon said (at page 275 of 30 Ore.):

"It may be stated, also, as a settled principle of law, that in order to establish a resulting trust the evidence must be strong, clear, convincing, and indubitable, touching the fact of payment by the alleged beneficiary, or for or in his behalf: 2 Pomeroy's Equity Jurisprudence, § 1040; *Sisemore v. Pelton,* 17 Or. 546 (21 Pac. 667); *Lee v. Browder,* 51 Ala. 288; *Westerfield v. Kimmer,* 82 Ind. 369; *Murphy v. Hanscome,* 76 Iowa 192, (40 N.W. 717). And when a payment of a part only is claimed, it must be shown in the same clear, concise, and unequivocal manner, the exact proportion of the whole price actually paid, and that the payment was made for some specific part or distinct interest in the estate: 2 Pomeroy's Equity Jurisprudence, § 1040; *Cutler v. Tuttle,* 19 N.J. Eq. 561; *Olcott v. Bynum,* 84 U.S. (17 Wall.) 59; *Baker v. Vining,* 30 Me. 127 (1 Am. Dec. 617); Browne on the Statute of Frauds, § 86. So it is, also, as respects constructive trusts—the evidence that the purchase was made with trust funds must be clear

and unmistakable: 2 Pomeroy's Equity Jurisprudence, § 1049."

The same rule has been stated in different terms in more recent Oregon decisions.[50]

(h) Since Brown had other sources of income and the exact items of credit making up the balances in his accounts have been agreed upon, it cannot be found or concluded that the funds in his accounts were embezzled.

As an alternative theory (in addition to automatic setoff) to support the judgment in favor of F.D.I.C., the trial court held that in the complete absence of any evidence that stolen funds got into Brown's accounts it could be inferred that they were in his accounts since when Brown started with the Bank in 1927 he had no other source of income but salary and stolen funds.

The exact language of the court is as follows:[51]

"There is an alternative and equally convincing theory upon which the same conclusion may be founded. A review of the evidence which, although indirect, is convincing, makes clear that since Brown had no other sources of income initially, except his salary and the embezzled funds, that the bulk of the moneys which he deposited was from these springs. *None of the stolen money can be traced directly*

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50 Schwartz v. Gerhardt, 44 Ore. 425, 432, 75 Pac. 698; Smith v. Barnes, 129 Ore. 138, 147, 276 Pac. 1086.

51 R. 49 and 50.

thereto, but any fact may be proven by direct or indirect evidence. This leads to a consideration of an analogous line of cases where the defaulter is not an employee of a bank but deposits the stolen funds therein. It will be apparent that the doctrine just held controlling would not apply under such circumstances (automatic setoff). However, the courts reach the same result on the ground that once fraud has been proven, the doctrine of comingling of funds applies[18] and the constructive trustee will be liable if he does not segregate the fund. Since there is no presumption of innocence attaching, his death will not protect the beneficiaries.[19]

* * *

"Thus it is, that all the moneys paid out by the bank belong to it.

"18 Massachusetts Bonding & Insurance Co. vs. Josselyn, 224 Michigan 159; Moseley vs. Fikes, 133 Texas 386; Long vs. Earle, 277 Michigan 505; Meyers vs. Baylor University, 6 S.W. (2d) 393, 394.

"19 See Meyers vs. Baylor University, supra."

If there were no evidence in the case as to the exact items of deposit in Brown's accounts when the premium checks cleared and if it were the fact that Brown had no funds of his own and no other source of income except stolen funds when the premium payments were made, a finding and conclusion that stolen funds were used to pay the premiums might be justified.

In this case, however, the exact items of deposit in his accounts, when the premium checks cleared, were agreed upon. F.D.I.C. does not contend that one single deposit item represents stolen funds—and the court held:[52]

> "The cardinal factor is, that no item of the embezzled funds is traced directly into the premiums of the insurance policies, nor into the bank accounts, which Brown maintained with the Harney County National Bank."

In addition, Brown's other sources of income were substantial during the time the premium payments were being made and he had funds to start with *other* than his salary and embezzled funds. The facts in this regard have also been agreed upon[53] and cannot be ignored.

When analyzed, the trial court's alternative theory[54] is that, since Brown stole money from the Bank, everything he owned can be presumed to have been acquired with stolen funds.

In other words, the court has placed the burden of proving that stolen money was not used to pay the premiums on Appellant.

The trial court cites 4 cases to sustain its holding in this regard. An analysis of them shows that they do not support the trial court's theory.

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52 R. 35.
53 R. 19-24—paragraphs A to H.
54 See page 42 herein.

Mass. Bonding & Ins. Co. v. Josselyn, 224 Mich. 159, 194 N.W. 548.

In this case an attorney was appointed administrator of two estates and he put the funds in his own account and paid premiums on existing policies on his life. After his death, the estates were permitted to share in the proceeds of the policies in the proportion that estate moneys were used. The Court said:

> "It clearly appears from (the attorney's) bank account that the balances on deposit at the time the several checks for premiums were paid were less than the amount of the moneys of the estates which had been theretofore deposited and not withdrawn."

It is apparent from the opinion that had the attorney's account contained more than enough of his own money to pay the premium payments at the time the premium checks were cleared that the estates would not have been permitted to share in the proceeds. This is the rule for which we contend in this case (which is discussed under the next heading) and if this case be followed, Appellant and not F.D.I.C. is entitled to prevail.

Mosely v. Fikes, (Texas Civil Appeals, 1939), 126 S.W. (2d) 589 (erroneously cited by the court as 133 Texas 386).

In this case, Plaintiff sued Defendant to impress a trust upon certain lands purchased with the proceeds of lands held for plaintiff by defendant, which defendant agreed to reconvey. The defendant admitted that he put

the proceeds of the sale of the lands in accounts containing his own funds and it was held:

> "Although defendant further testified that he had money of his own acquired from other sources, with which he paid for all those investments, we believe the court erred in the ruling noted, under the general doctrine relating to commingling of trust funds by a trustee with his own, and the adverse presumption that may be indulged from his refusal to answer questions propounded by plaintiff's attorney, under circumstances such as appear here."

The case is clearly distinguishable because the trustee who comingled the funds was alive and under such circumstances it can be admitted that the burden is upon the trustee to separate the fund. In this case not one cent of stolen money is traced into any of Brown's bank accounts, hence there is no commingling.

Long v. Earle, 227 Mich. 505, 269 N. W. 577.

This case involves a suit by beneficiaries to establish a trust upon property purchased with the proceeds of a trust fund. The trust was admitted and the court cited and relied upon 65 C.J. 973 to the effect that if there is comingling the whole fund is subject to the trust except insofar as the trustee may be able to distinguish and separate his own funds. Here again the trustee was alive, which distinguishes the case from the present case and a rule, which is not applicable here because of Brown's death, was correctly applied.

Meyers v. Baylor University, 6 S.W. (2d) 393.

This case involved a suit by Baylor University against Meyers and his wife to recover title and possession of real and personal property. It was claimed and found that Meyers embezzled Baylor's funds and invested them. Meyers contended that the burden was on Baylor University to trace the embezzled funds into the property shown to be embezzled and that not sufficient proof was offered. The court said on page 394:

> "Our courts have often said that, in order to establish a trust, such as is attempted in this case, the trust fund must be clearly traced into the specific property; that nothing must be left to conjective, and that no presumptions, except the usual and necessary deductions from facts proven, can be indulged * * *; yet this does not mean that the trust must be established beyond a reasonable doubt.
>
> "It is quite true that the burden of proof was upon plaintiff to establish the trust, but, where proof of the fiduciary relationship of the parties was made, the betrayal of the trust and the probable amount of the embezzlement shown, a prima facie case was presented, and the burden was then on Meyers to show, if he could, that his money, and not that of plaintiff, paid for the properties in whole or in part.
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> "Meyers was in possession of the exact facts, and it was his duty to reveal the entire trust. As he did not testify, and made no explanation of this matter, every intendment is against him.
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> * * *
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> "As stated in our conclusions, Meyers deposited his own (salary) and money embezzled from plaintiff to his personal credit in the banks, thus destroying the identity of these funds; hence the whole mingled

fund became subject to the trust, as well as the property purchased therewith.

* * *

"An audit of the accounts kept by him with 3 banks showed that, * * * he deposited to his personal accounts the gross sum of $81,589.22, of which $32,975 was his salary. He furnished, at the request of officials of plaintiff, a statement showing that all moneys of whatever nature or origin, other than salary, deposited in these accounts, amounted to the sum of $23,325.16. He thereupon admitted that the sum of these items, to-wit, salary and other moneys deposited shown in statement, subtracted from the total deposits in the banks, revealed the total amount of his embezzlements, which, by this method, were shown to be in excess of $25,000. The items sought to be charged represented a total investment of $21,200.

"* * * it appeared from the evidence that he had no other money or property with which to make the investments."

This case merely analyzes and follows the rule that where there is commingling and the trustee is alive that he has the burden of separating the funds, failing which the beneficiaries have a lien on the entire fund.

It is interesting to note that the court considers the salary which Meyers had drawn to be "his funds" as distinguished from "embezzled funds", which is our contention here, as against the position contended for by F.D.I.C.[55]

Since Brown is dead, the rule which requires a trustee

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[55] See page 22 herein.

to separate the fund, where a commingling is involved, has no application.

The case of *Logan v. Logan,* 138 Texas 40, 156 S.W. (2d) 507, relied upon by F.D.I.C., to place the burden upon Appellant in this action and cited and relied upon by the trial court in its opinion,[56] best demonstrates the inapplicability of the rule contended for. In that case, the court recognized the rule that where a trustee commingles trust funds with his own private funds and the proof necessary to distinguish the funds lies exclusively within the trustee's possession and he refuses to make a disclosure of such facts as he has at his command, that a presumption arises that all funds or property purchased therewith are subject to the trust.

The Court expressly holds, however, that if the trustee is dead that no such presumption exists or can be indulged in. The Court said on page 511 of 156 S.W. (2d):

> "The trustee is dead, and consequently there is no willful failure to make a disclosure on his part. * * * Under these circumstances, the rule applicable to a wrongful commingling is inapplicable."

A very recent case, decided by the Supreme Court of Idaho, is particularly applicable. It is the case of *Picciano v. Miller.*[57]

In that case, plaintiff contended that defendant had

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[56] R. 38.

[57] Originally decided Sept. 15, 1942; reversed on rehearing May 21, 1943. 137 P. (2d) 788.

unlawfully appropriated, out of their business, some six thousand dollars. Plaintiff sought to prove that the stolen money was used by defendant to purchase a home. The lower court found for plaintiff and defendant appealed. The original opinion affirming the case was reversed after a rehearing.

In the final opinion, the Court said (from 790 and 791 of 137 P. (2d)):

> "There is nothing in the record to show from where Miller received the money for the purchase and improvement of the property involved. Therefore, no part of the trust fund was traced into this particular piece of property. The conclusion that the money was traced into the property is evidently based on inference, that inference being that as Miller bought the property and it did not appear he purchased it with funds he had acquired otherwise, it would therefore follow that he used the trust money for that purpose. In matters of this kind, no presumption whatever can be indulged in by the courts. The rule is announced in Pomeroy's Equity Jurisprudence, Volume 2, Section 422, page 184, as follows: 'A court of equity, in order to raise a resulting trust, will not assume from the mere fact that the purchaser had or might have had trust moneys in his hands, that he used them in paying for the property purchased, in the absence of evidence clearly showing such use by him.'
>
> "The question of the sufficiency of identification of a trust fund is discussed in 26 R.C.L., Section 219, page 1355, wherein it is stated: 'As to what is a sufficient identification of a trust fund when it is attempted to show that it remains a constituent part of the assets of an insolvent trustee's estate, it was at one time held by the courts of some of the states to be unnecessary

that the misapplied trust funds or proceeds of the trust property should have actually come into the possession of the executor, administrator, receiver, or assignee; not essential that it should be traced into the estate; * * * Most if not all of these cases have, however, been overruled or greatly limited and qualified and the generally accepted rule at the present time is that it must appear that the trust property or its proceeds have found their way directly into the estate of the trustee, that the property must be found to reside in the assets at the time when the claim is asserted, and must not have been expended or dissipated for any purpose in the business of the trustee.' See also 26 R.C.L., Section 218, page 1354.

"The rule applicable to the facts in this case is clearly stated in Jones on Liens, 3rd Ed., Volume 2, page 172, Section 1179, as follows: 'Trust funds which have been misapplied by the trustee to the purchase of lands in his own name may be declared a lien upon such lands; but it must be clearly proved that the trust funds were invested in the lands. It is not sufficient to show that the trustee was in possession of the funds, and while in possession of them he purchased and paid for the lands; *for in such case no presumption arises that the lands were purchased with such funds.* If the trust money has been mingled with other moneys of the trustee so as to be indistinguishable, and the trustee has made investments generally with the moneys in his possession the cestui que trust cannot claim a specific lien upon the property or funds constituting the investments.' (Italics mine.)

"What appears to be a leading case on this question, the same being cited in the several texts above referred to, is the old case of *Ferris v. Van Vechten,* 73 N.Y., beginning page 113, decided in 1878, and we quote therefrom a portion of the opinion, beginning page 119, as follows, to-wit: 'To follow money into

lands, and impress the latter with the trust, the money must be distinctly traced and clearly proved to have been invested in the lands. While money, as such, has no ear-mark by which, when once mingled in mass, it can be traced, it is, nevertheless, capable under some circumstances of being followed to, and identified with, the property into which it has been converted; but the conversion of the trust money specifically, as distinguished from other money of the trustee, * * * must be clearly shown. It does not suffice to show the possession of the trust funds by the trustee, and the purchase by him of property—that is, payment for property generally by the trustee does not authorize the presumption that the purchase was made with trust funds. The product of, or substitute for the original trust fund follows the nature of the fund as long as it can be ascertained to be such; and if a trustee purchase lands with trust money, a court of equity will charge them with a resulting trust for the person beneficially interested. But it must be clear that the lands have been paid for out of the trust money.'

* * *

"Had there been a tracing of any part of the trust money into the property in this case, then, of course, the rule from Waddell v. Waddell, 36 Utah 435, 104 P. 743, quoted in the original opinion, would have been applicable. That rule is not in conflict with the rule placing the burden on one who would impress property with a trust to show that some portion, at least, of the trust funds went into the property. Had that been done in this case, then the burden would have been upon appellant Miller to have shown that his own money or at least some portion thereof, had gone into the trust property, but due to the failure of respondent to trace any portion whatever of the so-called trust fund into the property, no such burden shifted to or was placed upon appellant Miller."

The trial court's alternative theory does not square with the Agreed Facts, with the applicable law establishing the burden of proof or prescribing the degree of proof required and it erroneously assumes the existence of a presumption that stolen funds got into Brown's accounts, *even in the face of its own direct finding that stolen funds were not traced into the accounts.*

(i) If commingling be assumed, since Brown's own funds were more than sufficient to pay each of the premiums when the checks cleared, Appellant is entitled to prevail.

Assuming that there is some evidence upon which a finding could be based that Brown placed depositors' funds in his accounts prior to the time the various premium payments were charged against his accounts (we deny that there is any such evidence in the case and the trial court held with us[58]), then Issues of Law X and the last two paragraphs of XI[59] must be decided.

"X

"If the total of the deposits in any account at any time is composed of Brown's own funds and funds of the Bank, who is entitled to the benefit of the premium payment made from said account if the premium payment be less than the amount of his own funds; if it be more than his own funds?

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58 R. 35.

59 R. 28 and 29.

XI

* * *

"The Defendant contends that if in any case Brown had a balance in his account made up in part of funds or property misappropriated, embezzled or wrongfully converted from the Bank and part from other funds, Defendant is entitled to the benefit of the whole premium payment thus paid.

"Plaintiff disputes this and contends that as a matter of law Brown would be held to have withdrawn from a mixed fund, first, his own funds, and if his own funds were sufficient to pay the whole premium payment that the Bank would not be entitled to any benefit from that payment."

It is Appellant's contention that if embezzled money is found to have been deposited in the accounts from which premiums were paid so that Brown's own funds and embezzled funds were mixed together, that even so Brown would still be held to have drawn out his own funds in paying the premiums and if his account contained enough to pay the premium payment that F.D.I.C. would have no claim on the payment so made. If the premium payment exceeds the amount of Brown's own funds then in the account, then F.D.I.C. would share in the premium payment to the extent of any required balance.

A leading case upon this point is *Bromley v. Railway Company,* 103 Wis. 562, 79 N.W. 741. In that case Bromley was an agent of the Railway Company and he, from time to time, collected large sums of money which he was under obligation to immediately remit to the Company. Bromley had one bank account in which he kept money of

his own, some of his wife's and into which he placed money collected for the Railroad. At a time when he was badly in arrears in his remittances to the Railroad he purchased several life insurance policies in favor of his wife. After his death, which occurred shortly after the taking out of the policies, the railroads claimed that they were entitled to the proceeds of the policies because the premiums were paid with funds belonging to the railroads.

In rejecting the Railroads' contention, the Court said on page 743:

> "Assuming that Mr. Bromley received and deposited the moneys of the defendants (Railroads) and the plaintiff (his wife), in a fiduciary capacity, and that in drawing moneys from the bank on checks for his own private use he is presumed to have drawn out his own moneys in preference to any of such trust funds, yet it does not follow that, in paying such premiums on such insurance by checks for the benefit of his wife, he is presumed to have drawn the moneys belonging to the defendants, instead of the moneys belonging to his wife. On the contrary, and as the law presumes innocence instead of wrong, we would naturally suppose that he would pay such premiums from his wife's moneys, instead of moneys belonging to the defendants; in other words, all checks drawn for the benefit of the defendants would naturally be supposed to have been drawn on funds belonging to the defendants, and all checks drawn for the benefit of the plaintiff would naturally be supposed to have been drawn on funds belonging to the plaintiff. Of course, this is on the supposition that Mr. Bromley had on deposit the funds of both parties. The court finds that Mr. Bromley received and deposited to his credit in the bank from the plaintiff's separate estate $700 in 1894, $400 in 1895, and in addition he received from

her to pay premiums on life insurance $100 in the latter part of 1896. There is no evidence that he ever drew out any of such moneys so deposited for the plaintiff, or for her benefit, except in payment of the premiums mentioned."

On the same page, it is also said:

"* * * Since the insurance was for the benefit of the plaintiff, and payable to her, Mr. Bromley would be quite as likely to pay the premium thereon out of her moneys in the bank to his credit as out of the moneys of the defendants. The relations between Mr. Bromley and the defendants appear to have been of mutual confidence, and more like the relation of debtor and creditor than that of trustee and cestui que trust. The burden was on the defendants to prove that their money went into the policies."

There is a direct holding upon the point by the Supreme Court of Oregon.

In *Portland Building Co. v. State Bank of Portland,* 110 Ore. 61, 222 Pac. 740, the Bank was obligated to pick up and pay the coupons and bonds of the Building Company, using funds specially deposited with it for that purpose. Although carried as trust funds, the moneys so entrusted to the bank were not segregated from but were mixed with other moneys belonging to the bank. Before the Bank paid any bonds or coupons, it became insolvent and there was in the fund into which the trust fund had been placed more than the amount of the trust funds. The Building Company contended that its money was still

there and had not been dissipated. The court upheld this contention, saying on page 67 (of 110 Ore.):

> "The fact that the cash balances of the bank were constantly changing as new deposits were made and checks were paid cannot affect the rights of the cestui que trust to reclaim its money, either from the bank or the superintendent of banks, as the amount of the trust fund was at all times clearly ascertainable, and that amount was at all times actually in the bank. *The presumption of law is that, in paying checks drawn upon the bank and its other expenses, the bank used its own funds then in the bank, as it was its duty to do, and did not wrongfully use the trust funds in its possession* * * *."

(j) The admitted facts compel the conclusion that Appellant is entitled to prevail.

Applying the principles which we believe to be applicable to paragraphs IX to XIX, inclusive, of the admitted facts,[60] we reach the following results:

IX. Since no one knows the source of the funds used to pay the payment of December 22, 1940, upon Policy 12748022 (hereafter called the first policy), Appellant gets the benefit of the payment.

X. Since the first payment on the first policy was made from Brown's personal account at a time when it was composed of salary and cash items and there is no evidence to show that the cash deposit was either embezzled money or the proceeds of embezzled funds, Appellant must be given the benefit of the payment. Even if it be

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60 R. 6-14.

held that the cash were embezzled funds, since the salary items exceed the premium payment (which was less than $300.00), it must be presumed that Brown drew first his own funds, especially where it was admittedly drawn for his own purpose.

XI. The second payment on the first policy was made from Brown's special account. Under the Agreed Facts, it is established that the account contained genuine items of credit, payable to Brown personally, as follows:

American Aircraft	$ 250.00
Transfer from Personal Account	36.12
Transfer from Personal Account	145.48
Blyth & Co.	1,009.40
Checks	242.85

The premium payment was less than $300.00, so that Appellant must be given the benefit of this payment.

XII. The third payment on the first policy was drawn on the personal account and it was then composed only of salary items. The benefit of this payment must therefore be awarded to Appellant.

XIII. The fourth payment on the first policy was drawn on the personal account when it contained salary and a transfer from Brown's grain account. There is no showing that the grain account contained embezzled funds or the proceeds of embezzled funds, so Appellant must get the benefit of this payment.

XIV. The fifth payment on the first policy was drawn against the special account and since there is no evidence tracing embezzled funds into that account, Appellant is entitled to the benefit of it. In any event, there is

an item of credit to the account "Kidwell and Caswell $406.90" which is more than sufficient to pay the premium, so it must be awarded to Appellant.

XV. The first payment on the second policy was drawn on the special account and there is no evidence to show that embezzled funds were deposited in it, so Appellant must be given the benefit of this payment.

XVI. The second payment on the second policy was charged against the special account when it contained the same items against which the second payment on the first policy was drawn except it contained in addition a dividend on stock Brown owned in the Harney County Bank and a transfer from his personal account which was then made up only of salary items. Clearly this payment must be awarded to Appellant.

XVII. The third payment on the second policy was charged against the personal account when it contained the proceeds of the sale of a bond Brown owned, salary and currency. The salary and bond items are more than sufficient to cover the payment, so Appellant is entitled to the benefit of it.

XVIII. The fourth payment on the second policy was drawn on the personal account and came entirely from salary. Appellant should have the benefit of it.

XIX. The fifth payment on the second policy was made from the proceeds of the sale of cattle. No evidence was produced to show that the cattle were not Brown's or were purchased with funds embezzled from depositors. Obviously, Appellant is entitled to the benefit of this premium payment.

SPECIFICATION OF ERROR III

THE TRIAL COURT ABUSED ITS DISCRETION IN DENYING APPELLANT'S MOTION FOR NEW TRIAL.

Since it was made to appear that an audit of the Bank's records disclosed that Brown was not indebted to the Bank in the years when the various premium payments were made, so that the whole basis of the court's holding against Appellant was incorrect, the trial court abused its discretion in not ordering a new trial.

ARGUMENT

Prior to the pretrial conference, which resulted in the Pretrial Order, Appellant had not made an audit of the Bank's records. At the conference, F.D.I.C. represented that its audit indicated that by reason of withheld deposits alone Brown had taken from depositors' accounts the following amounts in the years indicated:[61]

Year	Net Shortage
Prior to 1935	$ 5,869.25
1935	12,893.21
1936	3,031.52
1937	17,996.84
1938	40,982.14
1939	93,203.44
1940	39,780.33
1941	489.99
1942	10,319.61

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[61] R. 79. Exhibit 34.

The trial court used these figures as the basis for its holding that at no time did the total in Brown's accounts equal the sum of his defalcations from commercial accounts alone.[62] No attempt was made by F.D.I.C. to break down by years any other source of alleged shortages.

In connection with an action pending in the District Court by F.D.I.C. against Edward N. Brown's Estate, an audit was made of the Bank's records in May and June of 1944. The audit was in progress when the court's opinion was announced and it was completed shortly thereafter.

According to the auditor for the Estate, it appeared probable that Brown was not, in fact, indebted to the Bank by reason of alleged embezzlements during the years 1935, 1936, 1937, 1938, and perhaps in the subsequent years, except 1942. The auditor also discovered that many of the so-called withheld deposits were actually reflected on the Bank's record so that the funds were actually received by and went through the Bank.

As soon as these findings were reported to Appellant, an appropriate Motion for New Trial was filed in which these facts were made to appear.[63]

Counsel for F.D.I.C. filed an affidavit in opposition to the Motion, in which he attempted to explain the so-called withheld deposits—but it is apparent from his explanation that, in fact, the withheld deposits actually were recorded in the daily savings journal or ledger so that

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62 R. 33.

63 R. 68-71.

the funds of necessity were received by and passed through the Bank.[64]

Since the result would be entirely different and Appellant would be entitled to prevail even under the trial court's decision, if she were permitted to present the true facts, we contend that the trial court abused its discretion in refusing to grant a new trial.

CONCLUSION

The case of *American Surety Co. v. Bank of California* has not and cannot be distinguished. F.D.I.C.'s claim to the fund must therefore be denied.

In view of the Agreed Facts, it cannot be found or concluded the embezzled funds were used to pay the premiums.

In any event, the trial court committed reversible error in refusing to grant a new trial.

Respectfully submitted,

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[64] R. 75 and 76.

No. 11000

In the United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

RUBY M. BROWN,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Defendant,

FEDERAL DEPOSIT INSURANCE CORPORATION,

Appellee

BRIEF OF APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF OREGON

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PRESS OF JUDD & DETWEILER, INC., WASHINGTON, D. C.

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Statement of the Case

To the chronology of events stated in appellant's statement of facts there should be added the following:

Edward N. Brown, during the time he was employed as teller, assistant cashier, director and vice president of the Harney County National Bank (hereinafter referred to as the Bank), engaged in systematic pillage of its funds and assets. The Bank's deposits were something over $1,200,000; he succeeded in misappropriating about $416,000

(R. 16, 17). He accomplished this by a variety of means such as withholding deposits, making unauthorized withdrawals from customers' balances, taking the Bank's cash, retaining payments made by its borrowers on notes and keeping the notes in the note pouch as bank assets, and looting the Bank's accounts with correspondent banks.

By juggling customers' accounts and deposits alone, such as withholding deposits and making unauthorized withdrawals, from a date prior to 1935 up to the time of his suicide on August 6, 1942, he embezzled and misappropriated over $223,000. These peculations are scheduled by years and set forth in the stipulated evidence (R. 17).

He succeeded in concealing his crimes not only from other officers and stockholders of the Bank, but from the national bank examiners until the day of his death.

In 1935 he took out with the New York Life Insurance Company the policies of insurance involved (R. 3), and all of the premiums, with the exception of one, which could not be traced, were paid by the Bank in honoring ten checks for the sum of $297.20 each and one check for $310.40 (R. 57, 58), which Brown drew with seeming indiscrimination upon either the account carried in the Bank designated "Edward N. Brown, Personal", or "Edward N. Brown, Special" (R. 6-14, paragraphs X to XIX). At the time each of these checks for insurance premiums was presented to the Bank and honored by it, the books of the Bank reflected credit balances in the respective accounts on which the checks were drawn in excess of the amount of the checks. These apparent credit balances were in fact fictitious because (a) at all times from January 1, 1935, to the date of his death he was indebted to the Bank by reason of his thefts, embezzlements and misappropriations in sums vastly exceeding the apparent credit balances in his favor shown on the Bank's books; (b) on four occasions the

purported balances in Brown's personal account were built up with credits representing salary and stock dividend payments wrongfully taken by Brown from the Bank, see R. 6, par. X; R. 8, par. XII; R. 11, par. XV; R. 13, par. XVIII; on one other occasion with a salary payment plus a transfer from one of his several other accounts, viz., his grain account, see R. 9, par. XIII; on still another occasion with a salary payment, currency of $240 from an unexplained source and the proceeds of a $100 Hearst Publication bond, see R. 12, 13, par. XVII; and on the last such occasion the balance in his personal account was made up of the proceeds of the sale of livestock, see R. 14, par. XIX, there being no direct evidence that Brown acquired the livestock with other than embezzled or misapplied bank funds; (c) the purported credit balances in Brown's special account were built up with currency from unexplained sources, R. 7, R. 9, par. XIV; R. 11, par. XVI, transfers from purported balances in his personal account, R. 7, R. 10, par. XV; R. 11, par. XVI, created with salary and dividend payments wrongfully taken by Brown from the bank, R. 11, par. XV; R. 12, par. XVI, rental from property and proceeds of sale of livestock, bonds or other property—see R. 9, par. XIV; R. 10, par. XV; R. 11, par. XVI, there being no evidence that Brown acquired the livestock, bonds or other property with other than embezzled or misapplied bank funds.

When the Bank honored and paid the checks no one connected with the institution had any knowledge of Brown's defalcations or the fact that he owed the Bank, rather than that the Bank owed him, R. 15. He made his mother beneficiary of the insurance, but at no time did she give any consideration therefor and he was not indebted to her in any amount.

After Brown's death it was discovered that the Bank's capital was impaired and it was unable to meet the demands of its depositors.

The Bank made application for financial assistance to the Federal Deposit Insurance Corporation (hereinafter referred to as FDIC), which had insured the Bank's deposits as provided by law. FDIC approved the Bank's application and agreed to purchase the Bank's unacceptable assets pursuant to powers conferred upon it by Federal statute (U. S. C. Title 12, Sec. 264 (n) (4) quoted in appendix p. —). Thereupon the FDIC and the Bank, on August 29, 1942, executed a contract for the sale to and purchase by FDIC of certain of the Bank's assets. The assets so acquired by the FDIC were those not considered of sound banking quality, having an aggregate book value of only $598,646.34 exclusive of the $800,000 note given by the Bank to FDIC and the Brown shortage set up in Exhibit A (R. 111) in two items, viz., Special Account for Adjustment, $150,000, and *Claim* v. *Edward Brown Estate,* $268,187.03. This sale was part of a transaction, whereby a second bank, The United States National Bank of Portland, Oregon (hereinafter referred to as the Purchasing Bank), was to take over the deposit liabilities (R. 88 and 89) and acceptable assets of the Bank. In further consideration of assuming the Bank's deposit liabilities the Purchasing Bank was to receive the consideration paid by the FDIC to the Bank for the unacceptable assets. The depositors of the Bank were then to become depositors of the Purchasing Bank.

The purchase price paid by the FDIC to the Bank was equal to the difference between the agreed value of the assets classified as acceptable by the Purchasing Bank and the amount of the deposit liabilities assumed by the Purchasing Bank (R. 91, 92, 93, 99, 100). The initial cash price

paid by FDIC was $906,856.47 (R. 99 and 100), (which was far in excess of even the $598,646.34 book value of the assets purchased), and FDIC agreed to pay such additional sums as might be necessary to meet the Bank's liability to any depositor or depositors not included in the list of deposit liabilities attached to the contract. The Bank, pursuant to the contract, delivered the acceptable or bankable assets including the amount of the initial purchase price, to the Purchasing Bank, thereby enabling the latter to assume and pay the entire deposit liabilities (R. 89).

Proceedings Below

The New York Life Insurance Company had issued two policies of insurance on the life of Brown in the sum of $10,000.00 each, in which policies Ruby M. Brown was named as beneficiary.

Upon Brown's death, Ruby M. Brown, as beneficiary, made claim for the full amount of the insurance policies. Two checks were issued to her by the insurance company for a total sum of $20,582.00. The insurance company, upon discovery that the FDIC had a claim against the proceeds of the policies, stopped payment on these checks. Whereupon Ruby M. Brown instituted this action against the insurance company.

The insurance company answered by depositing the funds in court and asking for an order requiring the claimants to interplead. By stipulation an order was entered discharging the New York Life Insurance Company of liability and setting up adversely the claims of Ruby M. Brown and FDIC.

A pretrial conference was held between the FDIC and Ruby M. Brown, resulting in the entry of a pretrial order defining the questions of fact and law to be determined by the court (R. 2-32).

The trial court decided that by reason of the wrongful and unlawful use by Edward N. Brown of the assets and property of the Bank a constructive trust arose in favor of the Bank, and in favor of the FDIC, as assignee of said Bank, for that proportion of the proceeds of said insurance policies as the amount of the premiums paid from the Bank's funds bears to the total amount of the premiums paid on said policies (R. 32).

Plaintiff filed a motion to amend the pretrial order and for new trial, which was denied (R. 77), whereupon Plaintiff appealed from the judgment and from the order denying her motion (R. 78). The opinion of the court below is reported in 58 F. Supp. at page 252.

Argument As To Specification of Error I

Appellant's specification of Error I contends that the trial court erred in concluding that FDIC succeeded to or became subrogated to the rights, if any, of the Harney County National Bank against the proceeds of the policy for the following alleged reasons:

(A) When FDIC made good the shortages in the depositors' accounts, the right of the Bank or its depositors to pursue the claim against Brown's insurance was destroyed, otherwise a dual recovery would be permitted.

(B) After payment by FDIC there was in existence no enforceable claim against insurance proceeds which the Bank could assign to FDIC and which would support a recovery in favor of FDIC.

(C) FDIC has no right of subrogation.

(D) The assignment to it of the assets of the Bank or the depositors' claims cannot assist it.

Appellant's argument in support of contentions (A) and (B) attempts to analogize the position of the FDIC, in the

case at bar, to that of a surety company on a fidelity bond, citing in support thereof as the controlling case, *American Surety Co.* v. *Bank of California* (1943), 44 F. Supp. 81, aff'd (CCA 9) 133 F. (2d) 160.

A comparison of the facts in the *American Surety Co.* case with those in this case discloses that no such analogy may, with propriety, be drawn. Accordingly, appellant's contentions are not well founded and the *American Surety Co.* case, as will hereinafter be shown, cannot be considered as controlling or applicable to the facts in this case.

Appellant's argument in support of contentions (C) and (D) attempts to project the doctrine of equitable subrogation into this case. We submit, however, that the FDIC acquired its cause of action herein by assignment from the Bank rather than by way of subrogation to the rights of depositors.

Let us first consider the method by which the FDIC acquired its cause of action herein:

The FDIC, an agency of the Federal Government, is a corporation organized and existing under and by virtue of an Act of the Congress of the United States, *F. D. I. C.* v. *Mangiaracina* (1938), 198 A. 777, 16 N. J. Misc. 203; *U. S.* v. *Doherty* (D. C. Neb. 1937), 18 F. Supp. 793.

The FDIC insured the deposits of the Bank.

Because of Brown's peculations, the Bank's capital became impaired and it was unable to meet its deposit liability, thus prompting the Bank's application to the FDIC for financial aid to protect the depositors of the Bank.

There are two methods by which the FDIC may protect the depositors of insured banks in financial difficulties:

> 1. By paying the claims of depositors in an insured bank which closes without making adequate provision for payment of its depositors. Under the statute this method is employed only where the bank is placed in

receivership. It involves the usual procedure of taking offsets, proving claims and obtaining assignments of claims, and is commonly referred to as the *pay-off* procedure. The liability of the Corporation under this procedure is fixed by the terms of the statute, and does not exceed $5,000 per depositor (U. S. C., Title 12, Sec. 264 (l) (1).)

2. By advancing cash to an insured bank, through the medium of a loan or by a purchase of assets of the bank, to replace substandard assets in order to facilitate the contemporaneous assumption of its deposit liabilities by another insured bank. This is commonly referred to as the *purchase* procedure. The liability of the Corporation under this procedure is not fixed by the terms of the statute but by negotiation and contract. The statute *authorizes but does not require aid* under this procedure. It expressly provides that the advances shall be "upon such terms and conditions as it (i. e. the FDIC) may determine" (U. S. C., Title 12, Sec. 264 (n) (4)). The Corporation may (1) limit precisely the amount of any advance which it makes and (2) make the advance by loan secured in whole or in part by the assets of the bank aided, or by the mechanism of purchasing assets, as was done in this case.

For a discussion of the power of the FDIC to make such a contract and its rights thereunder see *Thomas P. Nichols Co.* v. *National City Bank* (1943), 48 N. E. (2d) 49, cert. den. 320 U. S. 742; *Lamberton* v. *FDIC,* 141 F. (2d) 95.

In this case the FDIC met the contingency by the purchase method in the following manner: The Purchasing Bank purchased the acceptable assets of the Bank in consideration of its assumption of the Bank's deposit liabilities. The FDIC, pursuant to an appropriate resolution of its Board of Directors (R. 79), purchased the remaining assets of the Bank at a price fixed by the difference between the value of the assets purchased by the Purchasing Bank and the aggregate amount of the deposit liability of the

Bank. The cash thus realized by the Bank from the sale of its remaining assets to the FDIC was then turned over to the Purchasing Bank as further consideration for the aforesaid assumption of deposit liabilities. In accordance with its resolution the FDIC entered into an agreement with the Bank, the pertinent parts of which are quoted in the appendix *infra* at p. — and the entire agreement appearing in the record at p. 88 *et seq.*

This method is frequently utilized by the FDIC. Of the 390 insured banks which closed because of financial difficulties between 1934 and December 31, 1942, 150 banks with 902,000 accounts and $383 million of deposits were aided by the Corporation through advances to the extent of $170 million under this procedure. By comparison, during this period 240 banks with 364,000 depositors and $102 million of deposits were placed in receivership and the Corporation paid $81 million of claims of insured depositors.[1]

Among the assets purchased by and assigned to the FDIC was the Bank's claim against Edward Brown. This claim was founded on the loss sustained by the Bank by reason of the peculations of its funds and properties by Brown, its employee, director, and officer, amounting eventually to $416,777.73 (R. 59). It is apparent therefore that the FDIC acquired its cause of action herein by express contract with the Bank and not by way of subrogation.

Appellant's misconception of the relationship between the FDIC, the Bank, its depositors and the appellant is best illustrated by the following excerpt taken from page 9 of her brief:

> "In our case here, it is claimed that Brown wrongfully abstracted money from depositors' accounts in the Harney County National Bank under such circum-

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[1] 1942 FDIC Annual Report, p. 11. (The courts will take judicial notice of the annual reports to Congress of government agencies.) *Texas and Pacific R. R. Co.* v. *Pottoroff* (1934), 291 U. S. 245, 254.

> stances that the Bank was liable for the losses. FDIC had insured the depositors' accounts and it responded and has made good the shortages in the depositors' accounts, taking an assignment of the depositors' claims against the Bank. In this action FDIC is attempting to assert the remedy which the depositors and the Bank had to reach the proceeds of the policies on the life of the wrongdoer, and under the doctrine of the *American Surety Co.* case it must be held that when FDIC made good the shortages in the depositors' account that it merely did what it undertook to do for a consideration and therefore its payment discharged the debt and it cannot aid its position or change the consequences by taking an assignment or anything else."

The foregoing is utterly fallacious in that the money abstracted by Brown was the property of the Bank not "money from depositors' accounts." The relationship between a bank and a depositor is that of debtor and creditor.[2] When Brown embezzled funds from the Bank, the Bank suffered a loss of assets but continued to be indebted to its depositors. Consequently, the Bank alone (not the depositors) acquired a right of action against Brown. In the first sentence of the above quotation appellant seems to have been laboring under the notion that the situation is as though the bank had closed because of inability to meet its deposit liabilities and that a receiver had been appointed, in which event the receiver would have succeeded to the Bank's right of action against Brown and the depositors (or FDIC, as statutory insurer-subrogee) would have been relegated to filing claims with the receiver as

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[2] *Dahl & Penne, Inc.* v. *State Bank of Portland* (1924), 110 Ore. 68, 71, 222 Pac. 1090;

Mahon v. *Harney County Nat'l Bank* (1922), 104 Ore. 323, 329, 206 Pac. 224;

Steele v. *Bank of California* (1932), 140 Ore. 107, 112, 9 P. (2d) 1053;

In re Edwards Estate (1932), 140 Ore. 431, 440, 14 P. (2d) 274;

7 Am. Jur., Banks, p. 444, Sec. 444.

general creditors. However, that did not occur, but instead the FDIC properly acquired the right of action herein by way of purchase and assignment fro mthe Bank rather than from the depositors. So much for the first sentence of the foregoing quotation.

The second sentence thereof is a pure figment of appellant's imagination. FDIC insured the depositors' accounts but only to the extent of $5000.00 for each depositor. Through the method employed by the FDIC herein shortages in the Bank's assets were restored with cash supplied by FDIC, which made possible the assumption of the entire deposit liability by the Purchasing Bank. The Bank's liability to the depositors was assumed by the Purchasing Bank and the Bank's liability was extinguished by operation of law under the doctrine of novation when the depositors dealt with the Purchasing Bank in such manner as to release the Bank. *City National Bank* v. *Fuller* (CCA 8), 52 F. (2d) 870. The FDIC did not in fact, constructively or otherwise, take any assignment of the depositors' claims against the Bank and could not have done so because such claims were retained by the depositors and became obligations of the Purchasing Bank under its contract of assumption with the Bank.

As to the third sentence of the quotation, appellant errs in that she states that the "FDIC is attempting to assert the remedy which the depositors * * * had to reach the proceeds of the policies * * *." As hereinbefore stated, the depositors had no right of action against Brown whatsoever. The FDIC claims through the Bank, not through the depositors. The FDIC did not, by purchasing the assets of the Bank, discharge a debt. It was under no obligation to the Bank and the purchase of the assets was a transaction for value.

The appellant contends that the instant case is governed by the doctrine laid down in the case of *American Surety Co.* v. *Bank of California,* supra.

In the *American Surety Co.* case an insurer paid the actual amount of the loss, $6,562.33, to its insured, the employer of the defaulting employee under a fidelity bond. The loss was alleged to have been incurred by the insured's employee procuring the genuine signature of his employer to checks on which he had inserted the names of fictitious payees. By forgery of the fictitious payees' endorsements the employee obtained the proceeds of the checks. In denying recovery to the insurer against the paying bank under the theory of subrogation this court in its opinion said:

> "The right of subrogation is a creature of equity, applicable where one person is required to pay a debt for which another is primarily responsible, and which the latter should in equity discharge. * * * Accordingly, subrogation will not operate against an innocent person wronged by a principal's fraud. A surety may pursue the independent right of action of the original creditor against a third person, but it must appear that said third person participated in the wrongful act involved or that he was negligent, for the right to recover from a third person is merely conditional in contrast to the right to recover from the principal which is absolute. The equities of the one asking for subrogation must be superior to those of his adversary. If the equities are equal or if the defendant has the greater equity, subrogation will not be applied to shift the loss.
>
> * * * * * * *

It also stated that:

> "The cases, dealing with the surety's alleged right of subrogation to the claim of the original creditor against a third party with whom the indemnitor is not in privity, indicate that the result reached depends upon a careful analysis of the facts involved."

Throughout its opinion in the *American Surety Co.* case the Court was dealing with an asserted right in personam which, if upheld, would have required the bank to again pay the sums abstracted by the defaulter to the banks loss whereas here we are dealing with a right *in rem* (the insurance proceeds) and no attempt is being made to subject Mrs. Brown to personal liability. Moreover the insurance was a gratuity, she was not wronged by Brown's fraud, she will suffer no loss and as will be pointed out *infra* all equities favor appellee's claim, none favor hers.

The diagram appearing in appellant's brief attempting to illustrate the similarity between the case at bar and the *American Surety Co.* case is fatally defective in several important aspects. At the outset it should be noted that the contract with the Bank and its assignment of assets to the FDIC are totally disregarded. The diagram is entirely erroneous without giving consideration to the assignment, because:

1. The depositors had no right of action against Brown.

2. Prior to the assignment the FDIC had no right of action against Brown, for it could obtain no derivative right by subrogation from the depositors, because:

(a) It paid nothing to the depositors.

(b) The depositors had no right which could be subrogated.

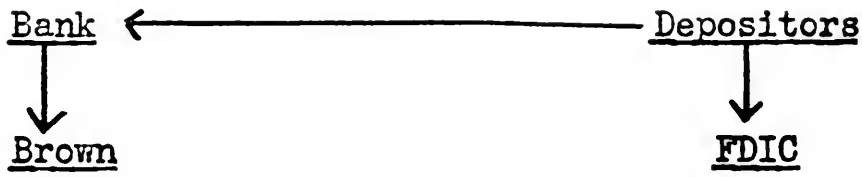
Furthermore, it did not stand in the position of a surety as to Brown for it insured the Bank's deposits, not Brown's fidelity.

3. The depositors assigned nothing to the Bank or to the FDIC.

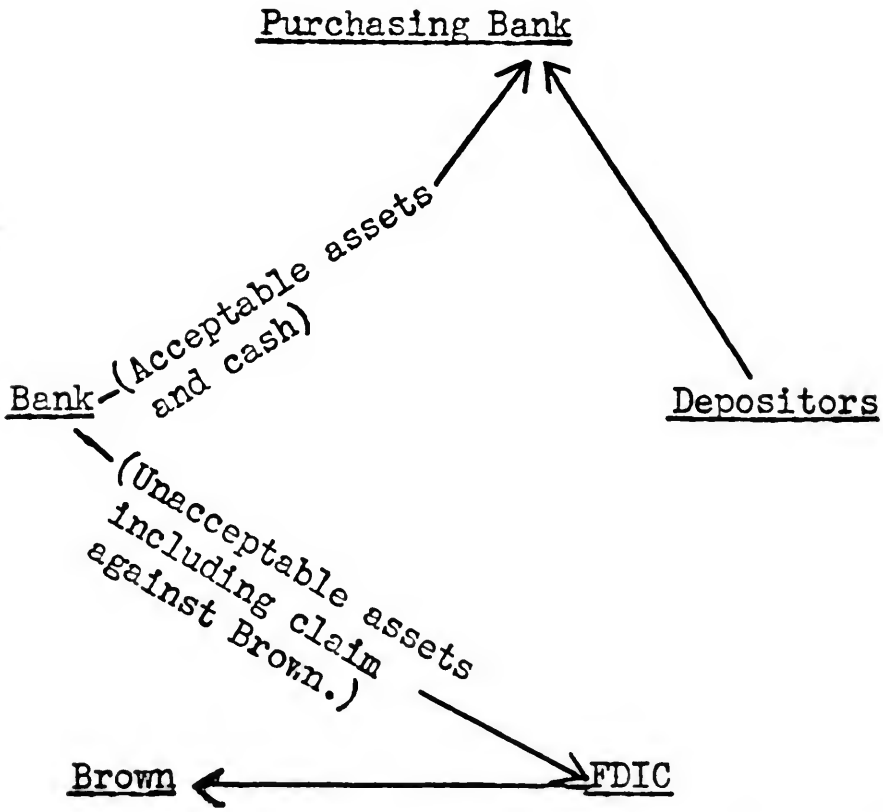
4. The FDIC was an assignee for value of the Bank's claim against Brown and not a subrogee of the depositors.

5. The FDIC took no assignment of the depositors' claims against the Bank.

Prior to the execution of the contract and the assignment the relationship of the parties was as follows:



After the execution of the contract and the assignment the relationship was as follows:



FDIC did not insure the Bank or the depositors against Brown's dishonesty. It insured each depositor to the extent of $5,000.

Had the Bank closed and FDIC paid its deposit insurance liability to the depositors, as required by statute in

such cases, it would have become subrogated to their rights against the Bank to the extent of the payment made (U. S. C., Title 12, Sec. (1)(7)). FDIC *did not* do this. Rather than permit the Bank to close, FDIC, pursuant to the Bank's application for financial assistance, purchased certain assets of the Bank and paid cash therefor, which it had authority to do, to the end that the Bank could make provision for payment to the depositors (U. S. C., Title 12, Sec. 264(n)(4)). The assets so purchased included the Bank's claim against Brown (R. 93). The depositors were strangers to this purchase transaction. The case at bar and the *American Surety Co.* case stand for different propositions and the appellant's faulty diagrams and incorrect assumptions of facts cannot reconcile them. *American Surety Co.* v. *Bank of California, supra,* is good law, but it is inapplicable to this case.

Weighing the equities between FDIC and appellant, it is submitted that the FDIC is a purchaser of assets for value including the Bank's claim against Brown arising from its unwitting investment in the insurance policies here involved. The proceeds of the insurance policies were not created by Brown's use of his own funds, nor by the funds of appellant. It was created by funds of the FDIC's assignor, the Bank.

The alleged equities of the appellant are that she is a beneficiary under a policy of insurance on the life of her son; that her son had repaid loans made by her to him; that her son was under no obligation to so designate her and she paid nothing for being so designated. Whereas the equities of appellee include the fact that the premiums for the insurance were paid with the Bank's funds dishonestly and criminally misappropriated and embezzled by her son from the Bank in which he was a trusted employee, officer and director, and the further fact that Brown

was heavily indebted to the Bank for concealed thefts by reason of which both the Bank and FDIC have suffered huge losses.

Do the contentions of the appellant, Ruby M. Brown, appeal to the conscience of equity when the facts in the case at bar disclose that her son was false to his trust; that through concealment of his frauds he procured the Bank to honor his checks; that the Bank and FDIC have suffered huge losses as the result of his transgressions; that the insurance premiums were paid by Bank funds; that she gave no consideration to her son or the insurance company, but because her guilty son placed her name in the policy she demands the fruits of his fraud and crime? All the equities, therefore, are in favor of the FDIC, none exist in favor of Brown or his beneficiary. Counsel asserts that "Appellant does not claim through the wrongdoer but under solemn contracts * * *."[3] She made no contract, she furnished no consideration for the contract. The contract was entered into by the wrongdoer. The consideration received by the insurance company was paid not with the wrongdoer's funds but with the funds of the wronged Bank.

The FDIC as assignee of the Bank's cause of action against Brown is proceeding to follow funds which Brown had embezzled or misappropriated from the Bank and invested in a life insurance policy. It is not asserted that the Bank could not have done so, and what the Bank could do, FDIC can also do, as it has by express contract and assignment acquired the Bank's claim against Brown.

The policies of insurance in the case at bar are no more solemn contracts than those in the case of *Jansen* v. *Tyler* (Two Cases), (1935), 151 Ore. 268, 47 P. (2d) 969, 49 P. (2d) 372, in which the wife and daughter of the insured,

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[3] P. 12, Appellant's Brief.

who was the defaulter, were the claimants, as beneficiaries, against the receiver of the company defrauded. The appellant's position in this case is no different than the position of the wife and daughter in that case. They were beneficiaries, and so is the appellant here. The insured had misapplied funds and used them to pay the premiums for the policies under which they claimed. That is precisely the appellant's position here. The proceeds of the policies were applied in repayment of the misappropriations in proportion to the amount of the premiums paid with misappropriated funds. That is what the trial court ordered in this case, and it should be sustained.[4]

Specifications of Error II

Contentions of the Parties

In appellant's specification of Error II, it is asserted that:

> "The sole question for determination is whether the premiums were paid with funds wrongfully embezzled or misappropriated from the Bank."

The gravamen of appellant's argument seems to be that "embezzled funds" were not directly traced into the premiums paid by the defaulter on the life insurance policies here involved. However, appellant has either failed to consider or overlooked the question of whether misappropriated funds were used to pay these premiums. In the interest of clarity, it is deemed advisable at this juncture

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[4] *Holmes* v. *Gilman* (1893), 138 N. Y. 369, 34 N. E. 205, 20 L. R. A. 566;

Truelsch v. *N. W. Mutual Life Ins. Co.* (1925), 186 Wis. 239, 202 N. W| 352;

Mass. Bonding & Ins. Co., v. *Josselyn* (1923), 224 Mich. 159, 194 N. W. 548;

Vorlander v. *Keyes* (C. C. A. 8, 1924), 1 F. (2d) 67.

to epitomize appellee's position in this main aspect of the case, which is:

1. Appellee agrees that the basic question in this case is whether the various premium payments were paid with funds belonging to the defaulter or with funds wrongfully embezzled or misappropriated (actual or constructive, directly or indirectly) from the Bank.

2. While the court below did not predicate its decision upon a finding that the various premium payments (except one) were paid with funds directly embezzled by Brown from the Bank, yet the Court observed (R. 48) that such a "finding could be made in the case at bar" and appellee submits for reasons which will be outlined below that the various premium payments, save one, were paid with funds embezzled either actually, indirectly or constructively from the Bank by Brown.

3. That the various premium payments (except one) were paid with funds wrongfully misappropriated from the Bank by Brown for the several reasons so learnedly stated by the lower court.

4. Appellant, standing in the shoes of the defaulter, is estopped and precluded as a matter of federal public policy from resorting to the very acts of thievery, misapplication and concealment condemned by the federal statutes relating to national banks as a means of thwarting the purposes of those statutes or as a means of preventing the FDIC, as assignee of the Bank, from recovering property into which the Bank's funds were dishonestly, criminally and unlawfully converted. Each of these propositions will be discussed in the order stated, followed by discussion of other questions raised.

As to the Matter of Tracing Embezzled Funds

Appellant would have us believe that the lower court in stating:

> "The cardinal factor is that no item of the embezzled funds is traced *directly* into the premiums of the insurance policies, nor into the bank accounts, which Brown maintained with the Harney County National Bank," (Italics supplied)

meant to exclude any finding or conclusion that embezzled funds were indirectly or constructively traced into the premium payments. The court's use of the word "directly" is alone enough to negative appellant's version, but if further proof be required that the court did not so intend, we need but to read Findings of Fact XX and XXI to the effect that all premiums (but one) were paid with funds of and belonging to the Bank and no part of the same were paid from funds or credits belonging to Edward N. Brown, and to Conclusions of Law I and II to the same effect, to say nothing of the court's scholarly analysis of the facts and the applicable law. The court below concluded (and we think correctly) that embezzled funds were either indirectly or constructively traced into the premium payments.

It is well known, and we think this court will take judicial notice of the fact, that each defaulting bank officer or employee uses a somewhat different technique from most other defaulting bank servants, not only in effecting his peculations but also in concealing them. The devices employed by Brown were unusually cunning and so well concealed that it has been impossible to trace the origin or disposition of more than a segment of his defalcations. Seemingly, a large portion of Brown's shortages consisted of cash abstractions, presumably from the till, which he concealed by making improper charges to depositors' ac-

counts, by not recording customers' deposits or payments on customers' notes, by withdrawing ledger sheets and otherwise. Each time he withdrew the cash, he not only violated the provision of U. S. C., Title 12, Sec. 375a, which prohibits an executive officer or director of a national bank from borrowing money or otherwise becoming indebted to the Bank, but he also violated the criminal section of the National Bank Act (U. S. C., Title 12, Sec. 592) by abstracting and embezzling the Bank's funds. Moreover, by not placing either in the till, or among the assets of the Bank, some evidence of his indebtedness in the form of a countercheck, debit ticket or note, he fraudulently and illegally concealed the abstractions. It should require no citation of authority, even if there were no statutory requirement that he take the oath as director prescribed by U. S. C., Title 12, Sec. 73, to support the proposition that, notwithstanding his peculations, he had the legal duty to place some evidence of his indebtedness among the assets of the Bank and otherwise to reveal to the officers, directors and bank examiners the nature and extent of his indebtedness.

Brown maintained several checking accounts in his name on the books of the Bank. Some of these were captioned "Grain" account, "Steer" account, "Edward N. Brown, Personal," and "Edward N. Brown, Special." The record made by Appellant is conspicuously silent in even attempting to explain the purpose of these several accounts. However, circumstances indicate that Brown maintained or used these accounts as an integral part of his scheme to conceal his peculations, such as unexplained and seemingly indiscrimate transfers from one account to another, presumably to meet outstanding checks; proceeds of the sale of livestock were credited in some instances to his special account and other times to his personal account; checks

issued in payment of life insurance premiums were drawn against both his personal and his special account; unexplained credits purporting to be represented by currency or cash in both accounts. These circumstances, considered in the light of Brown's unscrupulous pillage and faithlessness toward the bank, negative any presumption of honesty on his part and shifts to appellant the burden of proving honesty in all of his transactions in these accounts. *McConnel* v. *Henochsberg,* 11 Tenn. App. 176. Brown's death does not overcome the prima facie showing of complete dishonesty, *Meyers* v. *Baylor University* (Tex.), 6 S. W. (2) 393, 394.

Appellant has not met this burden. It must, therefore, be presumed that Brown maintained these several accounts for the purpose of concealing transactions which might have been discovered had he maintained but one checking account in his name. We respectfully submit that the Court should look through the form and to the substance of the transactions and conclude that in effect Brown maintained but one deposit account in which there was at all times actually a very substantial overdraft and that credits resulting from legitimate income of the defaulter (if there was any) should be applied to the pre-existing overdrafts rather than to pay those checks which would serve the best interests of the embezzler and those whom he sought to favor to the prejudice and at the expense of the Bank to which he owed undivided fidelity and loyalty. Does it matter that he did not run bookkeeping entries through his accounts to reflect all of his peculations when he had the duty so to do, and does his omission in this regard entitle appellant to rely on Brown's culpable acts? Certainly not.

The fallacy of appellant's contention is in the refusal to recognize that a depositor owns no part of the bank's funds, and that the relationship between them is solely that of

debtor and creditor. A bank is not bound, and in fact has no right, to pay out *its* funds in honoring a check drawn upon it, unless at the time of presentation this debtor-creditor relationship results in a credit balance in favor of the drawer equal to the amount of the check.

True, under certain circumstances a bank may permit an "overdraft"—itself a significant term, but permission implies knowledge. Brown, assistant cashier, director and vice president, concealed his wrongs and kept from the Bank all knowledge that the apparent balance was not actual. As a result of such concealment and violation of his duty to disclose his peculations, the Bank when it paid and honored Brown's checks for premiums was not paying a debt it owed to him, but was unknowingly investing its funds in a life insurance policy payable to appellant.

The law has never concerned itself with defining or describing all possible ways in which fraud, deceit, and breaches of trust can be accomplished. It has contented itself in declaring that however done, however new and ingenious the means and methods, its arm will reach out to correct the wrong and deprive the wrongdoer, and those who, without valuable consideration, claim through him, of the fruits of the wrong.

It was stipulated that during Brown's employment his peculations from the Bank amounted to $416,777.73, and that from 1935 to 1942 he embezzled and misappropriated from one source alone, viz., false entries, withheld deposits made by depositors, and by unauthorized and wrongful withdrawals from credits and accounts of depositors the sum of $223,586.35 (R. 17).

While the appellant did not concede the truth of these facts, it did admit that the FDIC could produce evidence in support thereof, yet appellant waived their production (R. 18). These facts, therefore, remain undisputed.

All of the checks in payment of premiums on the policies were drawn between 1935 and 1940 by Brown on his personal or special accounts with the Bank except the last premium on policy No. 12748022 (R. 6). The various items of credit appearing to his accounts at the times the checks in payment of premiums were honored were agreed to (R. 6-14). The FDIC did not admit that they were proper items of credit or that on the dates that they were recorded Brown had any actual credit balance in the Bank (R.14). So far as the items are concerned there is neither conflict nor dispute.

The trial court was not misled by the argument of the appellant that the embezzled funds with which the premiums were paid must be definitely and specifically traced, and relying on the case of *McConnel* v. *Henochsberg,* 11 Tenn. App. 176, observed:

> "Criticism is made of the application of that case to the situation here because of the fact that the court says 'it is evident that several thousand dollars of this stolen money was used by Henochsberg and did actually pass through his bank accounts.' The same finding could be made in the case at bar. However, this court does not place the decision here upon that basis, but upon the broad ground upon which the Tennessee court may also have relied, that the fiduciary who obtains property by breach of his obligations of confidence cannot equitably retain it."

The facts of that case are almost identical with those of the case at bar. Henochsberg was an assistant cashier and over a period of years embezzled $329,591.75 of the bank's funds. The bank examination revealed that he had manipulated depositors' accounts in covering his operations in much the same way as did Brown. He, too, had purchased life insurance, but his wife and children were the beneficiaries rather than his mother. The premiums on the

policies subsequent to January 1, 1920, were paid by checks drawn on the various accounts he had with the bank which he fed with the embezzled cash. The cash that passed through these accounts was far in excess of his salary and his own resources. The same question arose as to actually tracing the money used in paying the life insurance premiums and the other property involved, but the court decided the issue against the claimants and said:

> "While recognizing the settled rule that the misappropriated funds must be traced into the specific property before there can be a constructive trust impressed, we are of the opinion that where the trustee ex maleficio has pursued a systematic scheme and plan of stealing funds from the bank, where he sustains the fiduciary relation of assistant cashier and has direct supervision of the accounting department of the bank and abuses the confidence of the employers of the bank, and by the method employed uses the stolen funds taken by him from the deposits of customers, and at such times as it becomes necessary and expedient feeds a sufficient amount of the stolen funds into his own bank account to protect checks drawn by him on his accounts in the payment of life insurance premiums and payments on the other property sought to be impressed with the trust, that it constitutes such a tracing of the stolen funds into this property as to meet the exactions of the law with reference to impressing such property with a constructive trust. It would be a subversion of justice and all rules of equity to say, that a trusted employee charged with the duty of handling the funds of his employer, through a fraudulent scheme and systematic course of fraud and deception to steal the funds of his employer, and to mix such stolen funds with his own funds and out of the mingled funds, mingled with deliberate fraudulent intent to conceal and to hide away the identical funds stolen, and to invest such funds in property taken in his own name, could reap the fruits of his own misdoing at the expense of the employer."

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The appellant denies that any embezzled funds were traced into Brown's accounts and by way of emphasis states in her brief.[5] "In every instance the credits to his accounts are either salary or amounts received by him from outside sources." "Outside sources" might mean anything and possibly that is what appellant had in mind, because there are these unexplained items of cash and currency appearing in Brown's accounts when the premium checks were honored:

December 2, 1935	$150.00	"currency"	(R. 6).
October 3, 1936	50.00	"currency"	(R. 7).
October 23, 1939	250.00	"cash"	(R. 9).
October 21, 1937	240.00	"currency"	(R. 13).

The question of who had the burden of proof, and how that burden (if appellee's) was met and how appellant failed to sustain her burden is dealt with more fully under the subheading "As to the Matter of Burden of Proof," infra, but it should be observed at this juncture that the breakdown of Brown's accounts is not for all of the months between 1935 and 1940, but only the months when the premium checks were honored. Although this is not intended as an analysis of Brown's various enterprises, there are several items that deserve more than passing notice. In the years 1938, 1939, and 1940 he sold livestock to the total of $15,353.30. The livestock was not a gift, it was not all that he had, but merely what he sold, yet his salary in 1937 was only $225 per month and in and after 1938 it was but $250 per month. Appellant offered not one scintilla of proof that the livestock was purchased with Brown's own funds. The premiums on the insurance here involved were nearly $600 annually. In 1935 he began buying real estate at a time when his salary was only $160.00 per month.

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[5] P. 36 Appellant's Brief.

From 1935 to 1940 he bought real estate for which he had paid $6,433.03 and this was only the real estate he held at his death. Where did he get the money to pay for this real estate? His only actual resources about which there can be no question were two gifts of cash, one in 1930 of $2,300 and the other of $1,300 in 1931, but these sums were apparently dissipated since they do not appear in any amount in his accounts in the years 1935 to 1940. He borrowed $4,000 from his parents in 1938, 1939 and 1940, which he repaid. It is an irrefutable conclusion that his operations were founded by and nurtured with his peculations from the Bank. His only resources, besides the salary he drew, were borrowed funds of $4,000, but these are entirely inadequate for such operations. The funds passing through his grain and steer accounts were apparently the fruits of his operations with the Bank's funds and he drew on these accounts to feed his personal and special accounts from which the premium payments were made. Between 1935 and 1940 his peculations from one source alone were:

In the year 1935	$12,893.21
In the year 1936	3,031.52
In the year 1937	17,996.84
In the year 1938	40,982.14
In the year 1939	93,203.44
In the year 1940	39,780.33

Appellant concedes that the Oregon Supreme Court in *Jansen* v. *Tyler, supra,* has announced a rule which, if applicable to this case, would award to FDIC that proportion of the proceeds of the policies which the premiums paid from funds or property embezzled, misappropriated or wrongfully converted by Brown from the Bank, bear to the total premiums paid.

Tyler was the president and general manager of an investment company. He created an insurance trust for the

benefit of his wife and daughter, some of the insurance premiums having been paid with funds misappropriated from the investment company. He was indicted for embezzlement and shortly thereafter committed suicide. The action was instituted by the receiver of the investment company against the trustees of the insurance fund to recover the proceeds of certain policies, the premiums of which were thus paid. The court held that Tyler was a trustee of the investment company and allowed a recovery. It said:

> "Where a fiduciary embezzles funds of his cestui que trust and uses same in building an estate in life insurance, equity will impress a trust in favor of the cestui que trust in the proceeds of such insurance for moneys so embezzled."

and on the rehearing:

> "It is well settled that whenever a trustee or other person in a fiduciary position wrongfully purchases land or personal property with trust funds, or funds in his hands impressed with a fiduciary character, and takes title to such property in his own name, without any declaration of a trust, a trust with respect to such property at once results in favor of the original *cestui que* trust or other beneficiary. The doctrine in regard to such a trust is of wide operation and is used by courts of equity in maintaining and protecting beneficial rights of property. It is applied to trustees proper, to executors, administrators, directors, and managers of corporations, guardians of infant wards, agents using money of their principals, partners using partnership funds, and to all persons who stand in fiduciary relations towards others. 1 Pomeroy, Equity Jurisprudence (4th Ed.) sec. 422." (Italics added.)

For the reasons stated by the court below and discussed *infra,* the rule laid down in the *Jansen* case is controlling here.

Tracing of specific funds is not necessary to impress a trust on the proceeds of insurance. The Wisconsin Supreme Court in the case of *Truelsch* v. *Northwestern Mutual Life Insurance Co.* (1925), 186 Wis. 239, 202 N. W. 352, 38 A. L. R. 914, decided a case similar in many respects to the case at bar. Paul Truelsch was a clerk and bookkeeper who falsified entries and trial balances to cover his withdrawal of cash from his employer's deposits before they were taken to the bank. It is not entirely clear from what source the premiums were paid on the life insurance he had purchased. When his misdeeds were about to be uncovered he committed suicide. The court said:

> "On the subject of tracing the funds, counsel for the respondent relies on the legal proposition that the burden was on the appellant to prove that the money embezzled went into the policies; that, when the funds cannot be traced, the equitable right of the cestui que trust to follow and reclaim a trust fund fails; that the right to follow and reclaim a trust fund is always based upon the right of property, and not on the theory of preference by reason of an unlawful conversion.
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> "Although in this case the proof of criminal conduct on the part of Paul was involved, it is very clear, on well-settled rules, that it was not necessary to prove either the embezzlement or the tracing of the funds beyond a reasonable doubt. Nor was it necessary in proving that the moneys embezzled were used to pay for the premiums, to show that the identical specie or bills abstracted were so employed. Whatever may have been the former rule, it is not now the law that one cannot follow money in equity because it has no earmarks."

We do not contend nor argue that if Brown had received a gift from his father in cash and had used some of that cash to pay a life insurance premium that the Bank or

FDIC would be entitled to the proceeds of the policy. Neither do we contend nor argue that if Brown had taken a part of the hypothetical gift from his father, brought it to the Bank as a special deposit (not a deposit for a special purpose) (see *Keyes* v. *Paducah and I. R. Co.,* C. C. A. 6, 61 F. (2d) 611, defining "special deposit" and "general deposit," and *Titlow* v. *Sundquist,* C. C. A. 9, 234 Fed. 613, defining "deposit for special purpose") to be delivered to the life insurance company in kind or to purchase therewith a draft from the Bank payable to the life insurance company, that the Bank's funds would have been used to pay the premium. However, nothing of that sort was done, and this being a case in equity, the court will not indulge in a fiction by saying, as appellant would have it do, that the situation is as though Brown made a special deposit or purchased a draft, when to do so would defeat, not promote, the ends of justice and the plain purpose of the Federal protective statutes enacted for the protection of the Bank, its depositors, and the FDIC. We do, however, earnestly assert and submit that if Brown took that gift and deposited it in the Bank, the Bank then acquired the ownership of the money and became obligated to account to him either in the form of a deposit account which could be set off against Brown's indebtedness or by way of direct application on Brown's indebtedness without entering it as a credit in his deposit account.

Assuming, but not conceding, that some of the credits appearing in Brown's deposit account represented funds derived by him from legitimate sources, Brown admittedly intended that title to those funds was to pass to the Bank. Having done so and having previously violated practically every trust and confidence imposed on him by the Bank and by the law, neither equity nor the law will then permit him to secretly and surreptitiously juggle or apply those

credits to the payment of his insurance premiums, rather than to the reduction of his prior defalcations, thereby serving his best interests at the expense, and to the prejudice of his innocent, unwitting, trusting employer, the Bank, cf. *Grant Co. Bldg. Loan & Sav. Assn.* v. *Lemmon* (Ky., 1904), 78 S. W. 874, 875.

It is our position, therefore, that even if any of the credits which were reflected in Brown's account can be considered as funds received by Brown from legitimate sources (which appellee does not concede) that these credits operated either as a matter of law or in equity merely to reduce Brown's pre-existing indebtedness whether it be considered an overdraft or otherwise. Therefore there were no credit balances against which the insurance premium checks could be charged on the respective dates they were presented, but instead there were actual overdrafts which were increased by the payment of the premium checks. It follows that Brown used embezzled funds to pay the premium checks, and that embezzled funds were constructively, if not actually, traced into the premiums, save one. There was abundant evidence before the trial court to justify such findings.

As to the Matter of Tracing Misapplied Funds

The laws governing indebtedness to national banks by executive officers are explicit and stringent (U. S. C., Title 12, Sec. 375a), and as a director Brown was required under his oath honestly to administer the affairs of the Bank (U. S. C., Title 12, Sec. 73). He violated both provisions.

The deposit accounts Brown maintained at the Bank and on which he drew for the payment of the premiums created nothing more than a creditor and debtor relationship. They were no different than any other deposit account with a bank. The funds deposited are funds of the Bank and not

the depositor. As such the funds were not earmarked and if he deposited more than he withdrew, then the Bank was his debtor, conversely when he withdrew more than he deposited, the Bank was the creditor. Obviously Brown had not borrowed the money and he was prohibited by law from becoming otherwise indebted to the Bank. It is equally obvious that the credit balances in his favor in these accounts were fictitious because he had deliberately failed to charge his withdrawals and indebtedness to the Bank. Therefore, despite the apparent credit in his accounts, whenever the Bank honored his checks for premium payments to the insurance company, it was paying its funds and not Brown's funds. The Bank, by honoring his checks, did not ratify or confirm his indebtedness because it had no knowledge of the facts and was unaware of the true condition of his accounts.[6] Therefore, his attempted use of the alleged deposits to pay the insurance premiums, rather than the application or credit of those deposits to his defalcations, was clearly misapplication of the funds of the bank and the court below correctly decided that misapplied funds of the bank were traced into the premium payments.

Appellant's position seems to be that Brown's embezzlements and abstractions are something apart, unrelated to, and disconnected from his deposit account. With that position, we disagree for the reasons soundly relied upon by the court below and the portion of our argument under the heading "As to the Matter of Tracing Embezzled Funds." However, let it be asumed, arguendo that appellant's version as just stated can be supported and that, broadly speaking, the situation is something akin to Brown having borrowed $416,000 on demand or past due notes and at the

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[6] *Tilton* v. *Boland* (1934), 147 Ore. 28, 35, 31 P. (2d) 657; *Schomaker* v. *Petersen* (Cal., 1930), 285 P. 342; *Farnum* v. *O'Neill,* 252 N. Y. S. 900, 904; *Renland* v. *First Nat'l Bank* (Mont., 1931), 4 P. (2d) 488; *Miller* v. *Ahrens,* 163 Fed. 870, 877.

same time maintaining deposit accounts. What would his duty have been with respect to the use of the deposits?—knowing, 1st, that the Bank had a banker's lien on the commercial paper allegedly deposited by him for collection (see *Joyce* v. *Auten,* 179 U. S. 591; *Kane* v. *First National Bank* (C. C. A. 5), 56 F. (2d) 534, 85 A. L. R. 362, cer. den. 287 U. S. 603; 7 Am. Jur. Sec. 626, p. 453) and, 2nd, that the bank had the right to set off the balances appearing from time to time in deposit accounts (see 7 Am. Jur., Sec. 629, pp. 455-457), particularly where the depositor-borrower is insolvent and even though the debt were unmatured (see 7 Am. Jur., Sec. 632, p. 459).

As an officer and director who had taken a solemn statutory oath to faithfully serve the Bank, he was bound to credit those deposits on his indebtedness to the Bank rather than to use the deposits to build up an insurance estate for his mother. His breach of that duty was a patent misapplication of the Bank's funds. In legal effect, the deposit balances constituted collateral pledged by operation of law to secure the depositors' indebtedness and, to be sure, if he had converted securities or chattels which had been pledged as collateral, Brown would have been guilty of misapplication. *A fortiori* in the situation in the case at bar, his wrongful, dishonest use of the deposits for his selfish purposes constituted misapplication of the gravest type because he concealed his indebtedness from other officers and directors who could and no doubt would have applied the deposits to the reduction of Brown's shortages.

If, for any reason, there is a lack of tracing of embezzled funds into the premium payments, then to be certain such deficiency is clearly supplied by the tracing of the most flagrant and unconscionable species of misapplication.

The matter of set-offs of embezzlements against apparent credit balances in the defaulter's bank account was urged

upon and the court considered it in the case of *McConnell* v. *Henochsberg, supra,* in which the facts are peculiarly similar to the case at bar. The FDIC in support of its position cites the same quotation from that case which it presented to the trial court:

> "But it is clearly apparent from the record that checks issued by him in payment of the life insurance premiums after January 1, 1920, and in payment of the other investments, and payments on the other property sought to be impressed with a trust herein, were paid out of moneys which did not belong to him, and that he had so mingled the stolen moneys with his own funds in the bank accounts as to make it impossible to actually ear-mark the stolen moneys as having been used exclusively in paying the life insurance premiums and the payments on the other property involved. It is contended for appellants that this would necessitate the application of the rule of set-off, and that the misappropriated funds should have been set-off against legitimate deposits. We think a sufficient answer to this contention is that, the bank officials had no knowledge, intimation or suspicion that Henochsberg was a defaulter with the bank until the morning of his suicide. Henochsberg had so manipulated these accounts, as well as his own, as to successfully conceal his shortages and thefts. In this situation there was no opportunity for the bank officials to resort to set-off."

The trial court correctly followed this case and found that:

> "All the money paid out upon checks issued by Brown against his paper accounts, belong to the Bank."

The appellant has cited *Duke* v. *Johnson* (1923), 127 Wash. 601, 221 Pac. 321, but it is without merit here. The depositor Lindeberg, although his checking account was good for the amount charged against his account, was indebted to the bank at the time the check in question was honored. The bank was aware of the indebtedness, but

through choice had not exercised its right of set-off. There was no secret embezzlement or fraud involved and a constructive trust had not been applied to reach the funds in question.

The other case cited by appellant, *Peoples State Bank* v. *Caterpillar Tractor Co.* (Ind., 1938), 12 N. E. (2d) 123, has no effect here because once again the facts of that case show that there was no fraud; that the trust theory was not applied to decide the issues. It was a business transaction in which the bank set off its indebtedness against a depositor, and its rights were determined as of that time.

The point urged by the appellant for these cases might be helpful if it were not for the fact that the Bank at all times was at the mercy of Brown and could not exercise its rights against his accounts by reason of his fraudulent practices and concealment. Neither could the officers, nor directors, have authorized, permitted, or ratified Brown's acts without themselves violating Section 375a of U. S. C., Title 12.

The appellant cites *American National Bank* v. *King,* 158 Okla. 278, 13 P. (2d) 164, as authority for its position. The case represents a minority view which is not followed in Oregon. It holds that where a trustee *ex maleficio* uses funds to purchase insurance, the *cestui que* trust cannot recover the proceeds of the policy on the death of the trustee insured. It refuses to follow *Vorlander* v. *Keyes* (C. C. A. 8, 1924), 1 F. (2d) 67; and the majority view on the subject, and on the doctrine of commingling of funds says:

> "If we apply the 'bag' theory discussed in the briefs, there was contained therein the premiums and the sacrifice of a human life that the bank had no control over and no mortgage on."

While conceding that tangible property could be followed and recovered under the trust theory, it does not discuss and seems to have been wholly unaware of the principle of

law that the relationship between a bank and depositor is merely that of a debtor and creditor and that the doctrine of set-off applies. The court stated that had King been charged at any time with the amount of the defalcation of which he was cognizant, there never would have been anything to his credit at the bank, but it concluded:

> "The theory of the plaintiff bank is that if it can establish that the bank's money paid the premiums, it gets the insurance, overlooking the fact that it took King's death to mature the contract of insurance and create the funds."

Small wonder that the trial court in considering, but refusing to follow, the case says:

> "The court apparently entertained an emotional dislike for the doctrine of recovery of the proceeds of an aleatory contract and upon this feeling the case is founded."

The law of the Oklahoma case is not recognized in Oregon, where the majority view prevails and was followed in the case of *Jansen* v. *Tyler,* discussed and analyzed *supra,* in which it was held that the *cestui que* trust recovery is not limited to the amount of the misapplied funds, but is entitled to the proceeds of the policies in the proportion that the payments made from the trust funds bear to the total premiums paid and then that the *cestui que* trust may recover the entire proceeds where all the premiums have been paid with trust funds. Both parties agree that *Jansen* v. *Tyler* governs this case, if applicable to the facts here involved (R. 28).

As to the Matter of Estoppel by Public Policy

The Federal courts have grouped the numerous statutes in that field of law relating to national banks to take notice

of questions of public policy clearly shown by the pattern of those statutes. The clear intent of the statutory enactments is effectuated by the court's decision. See recent leading case of *Deitrick* v. *Greaney* (1940), 309 U. S. 190, reh. den. 1940, 309 U. S. 697. Public policy once declared is supreme. It is based upon the enforcement of that which is for the public good, 11 Am. Jur. Sec. 125, pp. 411-412. This being an action involving the winding up of the affairs of a national bank is controlled by the provisions of the Act and other related Federal statutes which constitute a complete code for the organization, regulation and winding up of such institutions. See *Cook County National Bank* v. *U. S.* (1883), 107 U. S. 445; *Deitrick* v. *Greaney, supra.*

The Federal banking statutes of the United States, by the very nature of their protective character, form a pattern from which is readily discernible a public policy designed to protect the public generally, and particularly from the fraudulent or criminal acts and unjust enrichment of officers, directors and employees of the banks. Some of the indicia of this policy found in the Federal statutes are:

1. Banks are subject to supervision and examination by the Comptroller of the Currency, U. S. C. Title 12, Sec. 481;

2. Banks are required to make reports of conditions from time to time to the Comptroller of the Currency and to publish such reports, U. S. C. Title 12, Sec. 161;

3. Embezzlement of banks' funds by an officer or employee or agent of the bank, as well as false entries, misapplication, false reports, etc., are constituted criminal offenses under provision of U. S. C. Title 12, Sec. 592.

4. The borrowing of money, either directly or otherwise, by executive officers of the banks is rigorously limited and largely prohibited under provisions of U. S. C. Title 12, Sec. 375a.

5. Directors are required to take and subscribe to an oath of office before entering upon discharge of their duties. U. S. C. Title 12, Sec. 73.

The Congress has enacted numerous other statutes and erected elaborate safeguards to protect the public in its dealing with national banks, U. S. C. Title 12, Chapter 2; with members of the Federal Reserve System, to which all national banks in Continental United States must belong, U. S. C. Title 12, Chapter 3; and with all banks, the deposits of which are insured by the Federal Deposit Insurance Corporation, U. S. C. Title 12, Sec. 264. The United States Supreme Court in its opinion in the case of *Deitrick* v. *Greaney, supra,* enumerated in considerable detail many of the protective and regulatory provisions enacted by Congress. Not only are these and other statutes, as well as regulations of the Federal Bank Supervising Agency (which have the force and effect of law) designed to protect the public in general, but also to protect Federal Deposit Insurance Corporation and the public fund which it administers. *D'Oench Duhme and Company* v. *FDIC* (1942), 315 U. S. 447, reh. den. (1942), 315 U. S. 830; *FDIC* v. *Vest* (C. C. A. 6, 1941), 122 F. (2d) 765, cert. den. (1941), 314 U. S. 696; *General American Life Ins. Co.* v. *Anderson* (Ky. 1942), 46 F. Supp. 189.

In the case at bar, Brown knowingly violated the prohibition against embezzlements, misapplications and false entries; the solemn oath taken by him as a director and the prohibition against officers becoming indebted to the bank. He also made false reports and misrepresentations to the directors and the bank examiners, and otherwise in almost every conceivable manner breached his statutory as well as common law fiduciary duties to the bank to serve his own selfish interests. In this action to recover insurance proceeds illegally and dishonestly acquired, Brown's bene-

ficiary now seeks by way of defense to plead and rely upon the bank records maintained by Brown, which are replete with false entries made with his full knowledge, if not his direction, which records concealed from the honest officers and directors of the Bank, as well as from the bank examiners, the real facts with respect to the status of his deposit accounts and his numerous transgressions. Appellant also seeks to support her contention by relying upon Brown's unconscionable act of omission in not applying his deposits to reduce his abstractions, and his wrongful act of commission in converting the alleged deposits to his own use when the Bank had the indisputable right to set off or appropriate them to reduce its loss. Paraphrasing the language of Mr. Justice Stone in *Deitrick* v. *Greaney, supra,* at page 198:

> It is a principle which derives its force from the circumstances that Brown's acts apart from their possible injurious consequences to creditors are themselves violations of the Federal Statutes; and that the statutes read in the light of their purposes and policy preclude resort to the very acts which they condemn, as the means of thwarting those purposes by preventing the receiver and the creditors of the bank from recovering property to which the bank's funds were dishonestly and unlawfully converted.

Rights or remedies ordinarily enforceable as well as defenses ordinarily available are not recognized by courts when to do so violates and thwarts the legislative policy and where the result would defeat the objectives sought to be accomplished by the legislative safeguards. See *Deitrick* v. *Greaney, supra,* holding that the wrongdoer was estopped to plead accommodation and *D'Oench Duhme and Company* v. *FDIC, supra,* where the court held that want of consideration could not be pleaded and cited numerous stated authorities to the same effect. See also *FDIC* v. *Vest,*

supra, extending the rule to one who only unwittingly acted in concert with a bank officer.

The doctrine of estoppel by public policy is further buttressed by the axiomatic principle that equity will not extend its aid in the assertion of a mere legal right contrary to the clear equity and justice of the case. *Jones* v. *N. Y. G. & I. Co.* (1880), 101 U. S. 622.

We respectfully submit that the judgment and decision of the court below be affirmed, not only for the reasons argued under the preceding headings but also on the grounds of estoppel as a matter of Federal public policy and as a matter of equity.

As to the Matter of "Salary"

The appellant completely ignores the significant part of the Pre-Trial Order pertaining to Brown's salary (R. 15):

> "That the directors of said Bank, being entirely ignorant of any wrongful acts, embezzlements, misappropriations or defalcations on the part of the said Edward N. Brown of any of the property or assets of the Bank or of any breaches of trust of duty on his part, authorized and fixed his salary in the monthly sums mentioned in said deposit slips as salaries and authorized him to draw on said amounts."

There is neither conflict nor dispute as to these facts.

Brown was prohibited by law from borrowing or becoming otherwise indebted to the Bank (U. S. C., Title 12, Sec. 375a):

> "No executive officer of any member bank shall borrow from or otherwise become indebted to any member bank of which he is an executive officer, and no member bank shall make any loan or extend credit in any other manner to any of its own executive officers;"

and under his oath as a director he swore (U. S. C., Title 12, Sec. 73):

> "* * * that he will, so far as the duty devolves on him, diligently and honestly administer the affairs of such association, and will not knowingly violate or willingly permit to be violated any of the provisions of this chapter."

Brown's manipulation of the records of the Bank not only eluded detection by the other officers and employees of the Bank, but by the national bank examiners as well. His operations succeeded over a period of years. The nub of the matter is not that the Bank did not discover his dishonesty, and exercise its rights against him, but that he drew the salary knowing of his defalcations. Brown violated his oath and breached his trust relationship by his acts of drawing a salary when he knew that in fact he was indebted to the Bank many times more than the said salary.

In the Restatement of Restitution, Sec. 138, is the following:

> "A fiduciary who has acquired a benefit by a breach of his duty as fiduciary is under a duty of restitution to the beneficiary."

The law is well settled that the unfaithful employee is not entitled to salary for a breach of trust or duty, whether the breach be as a result of negligence, want of skill or intentional.[7]

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[7] *Peterson* v. *Mayer* (Minn., 1891), 49 N. W. 245, 246; 35 Am. Jur., Master & Servant, Sec. 72, p. 503; *Hahl* v. *Kellogg* (1906), 42 Tex. Civ. App. 636, 94 S. W. 389; *Lahr* v. *Kraemer* (1903), 91 Minn. 26, 97 N. W. 418; 13 L. R. A. 72, Note; *Royal* v. *Royal* (1897), 30 Ore. 448, 47 P. 828; *Winslow* v. *Rutherford* (1911), 59 Ore. 124, 114 P. 930; *W. G. Reddingius Co.* v. *Enkema* (1923), 156 Minn. 283, 194 N. W. 646; and *Neely* v. *Wilmore* (1916), 124 Ark. 460, 187 S. W. 637.

The appellant's position, however, seems to be that since Brown had avoided an accounting that there is now no reason for her to account.

The appellant cites *Sweet* v. *Lang* (CCA 8), 14 F. (2d) 762, in support of her contention. That case falls far short of the facts of the case at bar. The officers in that case all paid their personal obligations with corporation checks. Such transactions were duly charged to their accounts, and interest on the sums so advanced was charged. All the officers had actual knowledge of the practice and acquiesced therein, and the corporation at the time was solvent. Again in the case of *Oliver* v. *Northwestern Mutual Life Ins. Co.* (Pa. 1932), 2 F. Supp. 266, the corporation was solvent and the officers pursuant to agreement, paid their insurance premiums with corporation checks, but there was neither concealment nor fraud perpetrated by the insured under the policy of insurance.

Here, however, there is the additional fact that the appellant is not an injured innocent third party. She gave no consideration, has no property right to be protected and stands in the same position as Brown, were he alive. He was an embezzler and in ignorance of his conduct the Board of Director permitted him to draw his salary.

To overcome the effect on the case at bar, the appellant makes an erroneous assumption of the facts in the case of *Jansen* v. *Tyler, supra,* that "Unquestionably, some of the premium payments which were held to have been made with Tyler's own funds were paid with funds which he drew from his salary account, either as salary or overdraft." This is contrary to the facts stated by the Court:

> "The receiver and Mrs. Woodworth, former treasurer of the company and bookkeeper, who was assisting the receiver, and W. L. Coleman, all of whom are accountants, made a thorough and searching examination of the records and books of the company and testified

> to the effect *that there had not been paid by the company or out of its funds directly or indirectly any premiums upon any insurance policies* upon the life of Mr. Tyler, except the three quarterly premiums on policies No. 629852 and No. 649853, of the New England Mutual Life Insurance Company'' (Italics supplied).

There is no basis whatever for the appellant's assumption that the other premiums were paid out of funds which Tyler had misappropriated from the company.

The appellant's contention that the salary drawn by Brown was no more ''embezzled funds'' than money regularly borrowed from the Bank is spurious reasoning under the circumstances of this case. Brown was in no position to borrow from the Bank; he did not draw the funds as a loan; and he had no intention of repaying the sum.

As to the Matter of ''Burden of Proof'' and the Trial Court's Alternative Theory Concerning Commingling of Trust Funds.

Appellant contends that the burden of proving that the premiums were paid with money embezzled or wrongfully misappropriated from the Bank is on the FDIC throughout the case and that a failure to show that any of the stolen funds found their way into the premiums should end the case.

The trial court in reasoning this case set forth the alternative theory that the commingling of funds where fraud has once been proven would have achieved an identical result. The appellant concedes that the proof to establish that the premium payments were paid from commingled funds need neither be conclusive nor direct and may be circumstantial.

The text writers say that the duty to separate and distinguish his property is on the defaulting trustee, hence the burden of proof is his.

65 C. J., sec. 899, p. 972:

> "As a general rule the cestui que trust's equitable right of recovery is not destroyed by reason of the fact that the trustee has so commingled the trust property with his own property that it is impossible particularly to identify the trust property; for, unless the trust property is such that it can be ascertained and separated from the rest, the entire commingled fund or property will be treated as subject to the trust, to the extent necessary to make good the claim of the cestui que trust to funds traced to, and still found commingled in, the common fund, except in so far as the trustee may be able to distinguish and separate that which is his own."

The record in this case is replete with clear and convincing proof of Brown's dishonesty and a dearth of proof that Brown had any substantial source of revenue or income other than from avails of money stolen from the Bank. These facts do not permit a presumption of Brown's innocence, and under such circumstances the burden is on appellant to show that the payment of premiums was not made with Bank funds.

The appellant has cited from Bogert, Trusts and Trustees, under the heading of "Tracing Trust Funds." From the same volume and under the same heading (Bogert, Vol. 4, sec. 925, p. 2676) the following is taken:

> "But other courts have aided the cestui in tracing by introducing a presumption that trust assets continued in the hands of the trustee to the time of his death or insolvency. They have held that a cestui makes out a prima facie case for tracing when he shows that trust assets came into the hands of the trustee, and that the burden is then upon the trustee or his successor to prove that those assets were not held by the trustee at his death or insolvency but had been used up in some fashion.

* * * * * * *

> "The cestui may use circumstantial evidence, as where he proves that the trustee had no property or source of income other than the trust funds from which he could have purchased property found in his hands at his death or failure."

The duty of the trustee not to mingle has been stated by Pomeroy, 5th Ed., Vol. 4, sec. 1076:

> "The trustee may not thus mingle trust moneys with his own, even though he eventually accounts for the whole, and nothing is lost. The rule is designed to protect the trustee from temptation, from the hazard of loss, and of being a possible defaulter. When a trustee does mingle trust moneys with his own, the right and lien of the beneficiary attach to this entire combined fund as security for all that actually belongs to the trust estate. (See 1058d.) A violation of this duty subjects the trustee to the following liabilities:
>
> 1. If the mingling is followed by actual loss, accidental or otherwise, the trustee must make good the principal sum lost, together with interest, and perhaps with compound interest.
>
> 2. Where there has been no positive loss, but the whole funds, principal, profits, and proceeds, are in the trustee's hands in their mingled condition the *burden of proof rests upon him* of showing most conclusively what portion is his, and whatever of the mixed fund, including both profits and principal, he cannot thus show to be his own, even though it be the whole mass, will be awarded to the beneficiary. The beneficiary is always entitled to claim and receive the *actual* profits when they can be ascertained."

The appellant has cited from Scott on Trusts. The footnote to the particular quotation cites but two cases. The first is *Tolman* v. *Crowell* (1934), 288 Mass. 397, 193 N. E. 60. In that case a demurrer to a bill to establish a trust in the proceeds of policies of life insurance was sustained

because the bill did not allege that the insured had used misappropriated funds in payment of the premiums. The second case is *Bromley* v. *Cleveland C. C. & St. L. Ry. Co.* (1899), 103 Wis. 562, 79 N. W. 741, which is a case that clearly can be distinguished from the case at bar and which is discussed more fully hereinafter.

The proof as to Brown's income incorporated in the pretrial order shows that his operations were too large for his limited "other sources."

The appellant does not dispute that Brown stole, embezzled and misappropriated from the Bank more than $400,000, nor is there any conflict that he was a fiduciary at the time. The premium payments of the insurance here involved at all times amounted to almost $600 annually. His salary was:

In 1935	$160 per month	$1920 annually
In 1936	$195 per month	$2340 annually
In 1937	$225 per month	$2700 annually
In 1938 to 1940	$250 per month	$3000 annually

His only legitimate outside resources were the gifts of cash amounting to $3,600 made in 1930 and 1931, and of which there is no trace in any of his accounts at any time during which the premium payments were made. In three years, 1938 to 1940, he received $15,000.00 (R. 22, 23) for livestock, which was merely his sales and not his holdings. These sales were made by Kidwell & Caswell (R. 9, 10, 22, 23). He must have purchased the livestock, because nowhere was it shown as a gift to him. Of his real estate purchases alone, made from 1935 to 1940, he held at the time of his death in excess of $6,400. There were unexplained items of cash of $690 and the proceeds of "grain" (R. 9) and "steer" (R. 9, 10, 22, 23) accounts passing through the two accounts on which the checks for the

premium payments were drawn and honored. The only legitimate source of funds was the $4,000 borrowed and repaid between the years 1938 and 1940. If Brown were alive can there be any doubt that a court of equity under such circumstances would require him to account? Is the appellant in any better position since she is claiming under him?

Appellant admits that the case of *Long* v. *Earle* (1936), 277 Mich. 505, 269 N. W. 577, lays down and correctly applies the proper rule but contends that it is inapplicable here because Brown was dead. The authorities hold otherwise, see *Meyers* v. *Baylor University* (Tex., 1928), 6 S. W. (2d) 393, 394:

> "It is quite true that the burden of proof was upon plaintiff to establish the trust, but, when proof of the fiduciary relationship of the parties was made, the betrayal of the trust, and probable amount of the embezzlements shown, a prima facie case was presented, and the burden was then on Meyers to show, if he could, that his moneys, and not that of the plaintiff, paid for the properties in whole or in part.
>
> "Meyers was in possession of the exact facts, and it was his duty to reveal the entire truth. As he did not testify, and made no explanation of this matter, every intendment is against him. 20 C. J., p. 482, sec. 78; 39 Cyc. p. 476.
>
> "As stated in our conclusions, Meyers deposited his own and money embezzled from plaintiff to his personal credit in the banks, thus destroying the identity of these funds; hence the whole mingled fund became subject to the trust, as well as all property purchased therewith.
>
> "The rule applicable to these facts is clearly and satisfactorily stated in 39 Cyc. p. 538, as follows:
>
> 'Where a trustee so mingles the trust fund or property with his own, or so invests it in property together with his own, that the trust fund or property cannot be

separated, or the amount of each ascertained, the whole mingled fund or property becomes subject to the trust, except so far as the trustee may be able to distinguish or separate his own fund or property, the burden of making such distinction or separation being on the trustee or *his representative;* and this rule applies so long as any portion of the fund or property into which the trust fund or property can be traced, remains.' '' (Italics added.)

Appellant's reliance (p. 49 of her brief) on the case of *Logan* v. *Logan,* 138 Texas 40, 156 S. W. (2d) 507, overlooks two vital distinctions, first, that there was no wrongful commingling of the funds by the father in the *Logan* case, whereas here if there was a commingling it was wrongful; second, that the Court in the *Logan* case reaffirmed the rule in the *Baylor* case when it said, at p. 510:

"It is a general rule that where a trustee wrongfully mixes trust funds of an indeterminable amount with his own private funds, the burden is on him to distinguish his funds and the amount thereof from those of the cestui que trust; and if he cannot do so the whole commingled fund, or the property purchased therewith, becomes subject to a trust in favor of the cestui que trust. * * *

"The rule is analogous to that of confusion of goods, Andrews v. Brown, supra. It is a harsh one, but is justified by the wrongful conduct of the trustee. The emphasis is on the injustice of requiring an innocent beneficiary to distinguish and trace the trust funds when the commingling was occasioned by the wrongful act of the trustee. It is expressed in Andrews v. Brown, supra [10 S. W. 2d 709], as follows: 'The principle, we apprehend, is but a part of equity's declination to extricate the wrongdoer from self-imposed hard conditions, or to tax the innocent, where one or two not in parti delicto must suffer.'

"We do not contend that death of a fiduciary creates a presumption of dishonesty so as to place the burden

> of tracing on the cestui but we do vigorously assert that the death of the fiduciary who has been shown to be dishonest and to have wrongfully commingled his funds with those of his cestui, does not shift the burden to the cestui to distinguish his funds from those of the unfaithful trustee. Death alone does not create a presumption of dishonesty, but neither does death overcome proof of dishonesty."

There is nothing in the opinion in the case of *Mass. Bonding & Ins. Co.* v. *Josselyn* (1923), 224 Mich. 159, 194 N. W. 548, to warrant the inference suggested by appellant. The case stands for the proposition quoted below and nothing more:

> "It is an elementary rule that a trustee may make no profit out of the handling of a trust estate. It is also well settled that, where money held upon trust is misapplied by the trustee, and traced into an unauthorized investment in property of any nature, the investment thus made, in the absence of a claim of bona fide ownership by a third person, may be treated by the cestui que trust as made for his benefit. * * * The consideration for the investment is trust money and the cestui que trust becomes the equitable owner of the property purchased therewith. His right thereto is a property right, not one created by any preference or favoritism shown by a court of equity.
>
> * * * * * * *
>
> "We are unable by any process of reasoning to apply any different rule to trust moneys used in the payment of life insurance premiums."

As to the case of *Moseley* v. *Fikes* (Tex. Civ. App. 1939), 126 S. W. (2d) 589, the appellant admits that the burden to separate funds is on the trustee who commingles funds if he is alive, but denies that Brown was guilty of any such practice.

In *Picciano* v. *Miller* (Idaho, 1942), 137 P. (2d) 788 the facts are that M was employed by P. In 1935 M bought a house for $1500, on which he put improvements costing $2000, at a time when his salary was $100 a month. He claimed that he was a partner and entitled to about $50.00 per week. The jury found that their relationship was not as partners, but as employer and employee. In the four years under examination M, therefore, had no income other than his salary of $4800. He borrowed $821.64 and his legitimate receipts were $5621.64, of which he expended $3817.65, leaving $1803.99, or an average of $37.58 per month for the four years with which to pay living expenses of his wife and himself, taxes and insurance on the property purchased, and automobile expenses. The court on the matter of tracing said:

> "While appellant might contend that all of the purloined money went into the living expenses and that he used only the money he received legitimately to pay upon the house, it was a reasonable deduction for the trial court to make that some part of the purloined money went into the purchase and improvement of the real property. Hence, there was a sufficient tracing to bring the case within the last rule above noted."

On rehearing, the court reversed itself. The court was divided in both the original opinion and on the rehearing.

The case turned on the divided views of the court's evaluation of the facts. It is of little weight in the present situation.

Aside from the facts that at all times Brown had no actual balance in his accounts, there are the items of cash, the proceeds of his grain and cattle sales traced into his accounts. It will be argued that these were the fruits of his operations founded on his own sources, but this can scarcely be credited in face of the overwhelming odds that with over $400,000 of embezzled money and only $4000 borrowed

money he could invest $6400 in real estate and be holding it at his death, and sell off some of his cattle for $15,000.

Assuming that all of the items in Brown's several accounts were not open to question, the predominantly important factor is that at no time during the period here involved did he have any credit balance with the Bank; the deposits he did make, even if legitimate, created no balance of credit in his favor, for at all times his indebtedness arising from his criminal conduct far exceeded the deposits.

The foregoing authorities are cited, quoted from and discussed to demonstrate and show the soundness of the trial court's alternative theory that had there been a commingling of funds, where fraud has once been proven an identical result would have ben achieved. FDIC does not contend that the facts justify a finding there was a commingling of funds in the case at bar. The cited cases and quotations clearly indicate, however, the inescapable burden of the appellant to prove that Brown had an actual credit balance (not a fictitious or extinguished credit balance) in his accounts with the Bank at the time the checks drawn on said accounts in payment of the insurance premiums were honored by the Bank. In the absence of such proof it must be conceded that the payment of premiums was made with Bank funds.

As to the Matter of "Withdrawing Own Funds"

Brown knew, and he alone, that at no time when he either issued or the Bank honored the checks in payment of the insurance premiums was the Bank indebted to him. He knew that there were no funds legally to his credit on which he could draw, or on which the Bank could properly honor his checks. He also knew that the Bank in honoring the checks was not loaning him the money, or extending credit to him, but that the Bank was deceived into paying out its funds by

reason of his false entries and dishonest conduct. He alone was responsible for the deception.

The case of *Bromley* v. *Cleveland C. C. & St. L. Ry. Co., supra,* is no authority in the case at bar for the contention claimed by appellant. Her contention is that if Brown's deposits were part legitimate and part embezzled funds, it would be presumed that his withdrawals would be on the legitimate part first until that was exhausted. In that case the insured had deposited in his account funds of his wife, which he held in trust and part of which he held for the specific purpose of paying insurance premiums, and the funds belonging to several railroads which he had collected and was bound to return. The court held (page 743) that the insured's relation to the railroads was that of creditor and debtor rather than a trustee, and that the insurance premiums were, therefore, paid from the trust funds of his wife, for which she had given him funds. The wife was the beneficiary of the policy. The presumption was that he withdrew the trust and specific funds for paying the premiums rather than the funds of the railroads.

Here the question is whether or not there was any credit, in fact, in the Bank belonging to Brown, on which he might draw for the payment of premiums. It is not a question of which of two parties are entitled to a commingled fund.

The case of *Portland Building Company* v. *Bank of Portland,* (1924), 110 Ore. 61, 222 Pac. 740, cited by appellant is of little value here. In that case the bank was a trustee mortgagee of a mortgage given by a building company, on which bonds of the company had been issued. Pursuant to the terms of the mortgage the company paid to the bank the necessary funds with which to redeem the bonds and coupons that had been issued. The bank held the funds, as trustee, in a special account and not as a general deposit. When the bank failed, the superintendent of banks denied the building company a preference because at all times it

was shown that the bank had in its possession cash in excess of the amount of the trust funds. It was presumed that in honoring the checks drawn against it in payment of its other obligations, the bank did not wrongfully use trust funds to meet these obligations.

In the case at bar, Brown's accounts were all general deposits and were part of the general deposits of the Bank. They were the funds of the Bank and not of Brown. When he drew premium checks the relationship was that of debtor and creditor, but he was the debtor, not the creditor. Therefore, when the Bank honored his checks it was not discharging an actual obligation it owed him, but was using its own funds.

Specification of Error III

Appellant's specification of Error III contends that the trial court abused its discretion in denying appellant's motion for new trial, since it was made to appear that an audit of the Bank's records disclosed that Brown was not indebted to the Bank in the years when the various premium payments were made, so that the whole basis of the court's holding against appellant was incorrect.

The contention was submitted by appellant in support of the motion to amend the pretrial order and for a new trial, and was denied by the trial court.

Appellant had the opportunity of having an audit made at the time of the pretrial and of the settlement of the pretrial order, but did not do so. Moreover, the auditors who made the examination of the Bank on behalf of the FDIC were in attendance at the pretrial, testified, and could have been cross-examined by counsel for appellant. Although the truth of the figures submitted by the FDIC auditors was not conceded by appellant, it was admitted that the FDIC could produce evidence to substantiate its offer and thus the pretrial order was completed and entered.

The appellant's auditor reported to appellant's counsel that it appeared probable (not a fact, but merely probable) that Brown was not indebted to the Bank by reason of his embezzlements and misappropriations during the years 1935, 1936, 1937, 1938 and perhaps in the subsequent years except 1942. The affidavit in support of the motion was made by appellant's counsel, not by the auditor. This evidence is the same as that by which counsel sought to retry the case. Such evidence was not presented to the court and no opportunity was afforded to cross-examine the auditor whom counsel quotes. Moreover, appellant's counsel did not permit the introduction of the testimony of the FDIC's auditors in substantiation of the shortages set up in the stipulated evidence.

Conclusion

The facts of this case set forth in the pretrial order were agreed to and are free of contradiction or dispute. The case was tried in August 1943, and after submission of comprehensive briefs was decided by the court on July 12, 1944. The motion to amend the pretrial order and for a new trial was filed November 28, 1944, and denied by the court on January 8, 1945.

Appellant has failed completely to prove that any of Brown's money was used to pay the premiums on his life insurance, whereas appellee has shown both as a matter of fact and of law, that all premiums save one were paid with embezzled or misappropriated funds of the bank. Moreover, in the circumstances of this case appellant is estopped as a matter of public policy and of equity to take the benefits of the defaulter's ill-gotten gains at the expense of the Bank and FDIC.

The decision and judgment of the court below is correct, according to well established law, and should be sustained.

The motion for a new trial was properly denied by the trial court.

Respectfully submitted,

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APPENDIX

U. S. C. Title 12, Sec. 264 (l) (1)

"The Temporary Federal Deposit Insurance Fund and the Fund For Mutuals heretofore created pursuant to the provisions of this section are hereby consolidated into a Permanent Insurance Fund for insuring deposits, and the assets therein shall be held by the Corporation for the uses and purposes of the Corporation: *Provided,* That the obligations to and rights of the Corporation, depositors, banks, and other persons arising out of any event or transaction prior to August 23, 1935 shall remain unimpaired. On and after August 23, 1935, the Corporation shall insure the deposits of all insured banks as provided in this section: *Provided,* That the insurance shall apply only to deposits of insured banks which have been made available since March 10, 1933, for withdrawal in the usual course of the banking business: *Provided further,* That if any insured bank shall, without the consent of the Corporation, release or modify restrictions on or deferments of deposits which had not been made available for withdrawal in the usual course of the banking business on or before August 23, 1935, such deposits shall not be insured. The maximum amount of the insured deposit of any depositor shall be $5,000. The Corporation, in the discretion of the board of directors, may open on its books solely for the benefit of mutual savings banks and depositors therein a separate Fund For Mutuals. If such Fund is opened, all assessments upon mutual savings banks shall be paid into such Fund and the Permanent Insurance Fund of the Corporation shall cease to be liable for insurance losses sustained in mutual savings banks: *Provided,* That the capital assets of the Corporation shall be so liable and all expenses of operation of the Corporation shall be allocated between such Funds on an equitable basis."

U. S. C. Title 12, Sec. 264 (l) (7)

"In the case of a closed national bank or District bank, the Corporation, upon the payment of any depositor as provided in paragraph (6) of this subsection, shall be

subrogated to all rights of the depositor against the closed bank to the extent of such payment. In the case of any other closed insured bank, the Corporation shall not make any payment to any depositor until the right of the Corporation to be subrogated to the rights of such depositor on the same basis as provided in the case of a closed national bank under this section shall have been recognized either by express provision of State law, by allowance of claims by the authority having supervision of such bank, by assignment of claims by depositors, or by any other effective method. In the case of any closed insured bank, such subrogation shall include the right on the part of the Corporation to receive the same dividends from the proceeds of the assets of such closed bank and recoveries on account of stockholders' liability as would have been payable to the depositor on a claim for the insured deposit, but such depositor shall retain his claim for any uninsured portion of his deposit: *Provided,* That, with respect to any bank which closes after May 25, 1938, the Corporation shall waive, in favor only of any person against whom stockholders' individual liability may be asserted, any claim on account of such liability in excess of the liability, if any, to the bank or its creditors, for the amount unpaid upon his stock in such bank; but any such waiver shall be effected in such manner and on such terms and conditions as will not increase recoveries or dividends on account of claims to which the Corporation is not subrogated: *Provided further,* That the rights of depositors and other creditors of any State bank shall be determined in accordance with the applicable provisions of State law."

U. S. C. Title 12, Sec. 264 (n) (4)

"Whenever in the judgment of the board of directors such action will reduce the risk or avert a threatened loss to the Corporation and will facilitate a merger or consolidation of an insured bank with another insured bank, or will facilitate the sale of the assets of an open or closed insured bank to and assumption of its liabilities by another insured bank, the Corporation may, upon such terms and conditions as it may determine, make loans secured in whole or in part by assets of an open or closed insured

bank, which loans may be in subordination to the rights of depositors and other creditors, or the Corporation may purchase any such assets or may guarantee any other insured bank against loss by reason of its assuming the liabilities and purchasing the assets of an open or closed insured bank. Any insured national bank or District bank, or, with the approval of the Comptroller of the Currency, any receiver thereof, is authorized to contract for such sales or loans and to pledge any assets of the bank to secure such loans."

Excerpts from Agreement Between Bank and F. D. I. C.

"THIS AGREEMENT, made and entered into this 29th day of August, 1942, by and between the Harney County National Bank of Burns * * * and the Federal Deposit Insurance Corporation * * *

"WITNESSETH:

* * * * * * *

"WHEREAS, the Bank proposes to sell certain of its assets to The United States National Bank of Portland * * * in consideration of the assumption of the deposit liabilities of the Bank as shown by the Bank's books as of the close of business on the date hereof; and

"WHEREAS, the Bank has filed an application requesting the Federal Deposit Insurance Corporation to purchase certain assets of the Bank and/or to loan money on the security of said assets in order to facilitate and make possible the proposed sale of assets to, and the aforesaid assumption of the deposit liabilities by The United States National Bank of Portland; and

"WHEREAS, the Board of Directors of the Federal Deposit Insurance Corporation has determined that the Federal Deposit Insurance Corporation will not make a loan to the Bank but will purchase, on certain terms and conditions, all of the assets of the Bank not purchased and acquired by The United States National Bank of Portland, as aforesaid, and has concluded that such purchase of assets by the Federal Deposit Insurance Corporation will reduce a risk and avert a threatened loss to the Federal Deposit Insurance Corporation; and

* * * * * * *

"Now, Therefore, each of the parties hereto intending to be legally bound hereby, do severally undertake, promise, covenant, and agree each with the other, and the Bank does hereby represent, warrant, covenant and agree to and with the Federal Deposit Insurance Corporation, as follows:

* * * * * * *

"Without any limitation on the generality of the foregoing, the property so sold, granted, conveyed, assigned, transferred and set over to the Corporation * * * shall expressly include, without being limited to, each and all of the following:

* * * * * * *

"(2) All assets of the Bank which are not carried on its books of account or which are carried on such books at a nominal amount for bookkeeping purposes.

* * * * * * *

"(5) All contracts, rights, claims, demands, choses in action or causes whatsoever, pending causes of action, and judgments, whether known or unknown, which the Bank owns, holds or has against any person or persons whomsoever, including, without being limited to, any claims against its stockholders for payment of or by reason of ownership of its capital stock (neither the mention of the foregoing liability or the approval of this agreement by the Bank and/or its stockholders shall be deemed an admission by said Bank or stockholders of the existence of such liability) any claims against its directors, officers or employees or their sureties arising out of any act of any such persons in respect to the Bank of its property or arising out of the non-performance or manner of performance of their duties, any claims against any person for money or property of the Bank, or for damages, which the Bank may have or own."

No. 11000

In the United States Circuit Court of Appeals

For the Ninth Circuit

RUBY M. BROWN,

Appellant,

vs.

NEW YORK LIFE INSURANCE COMPANY,

Defendant,

FEDERAL DEPOSIT INSURANCE CORPORATION,

Appellee.

APPELLANT'S REPLY BRIEF

Upon Appeal from the District Court of the United States for the District of Oregon.

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THE IVY PRESS, PORTLAND

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Upon Appeal from the District Court of the United States for the District of Oregon.

APPELLEE'S "STATEMENT OF THE CASE"

The greater part of Appellee's "Statement of the Case" is argument presenting its theory of the law as applied to the facts.

The objectionable part of the "Statement" commences with the sentence starting at the bottom of page 2 and continues on to the heading "Proceedings Below" on page 5.

We, of course, concede that F.D.I.C. is entitled to argue its theory of the law as applied to the facts — but such argument does not belong in the "Statement of the Case".

Obviously, if the agreed facts contained the conclusions which Appellee sets forth in its "Statement", there would be nothing for this court to decide.

The governing facts — correctly stated — are all agreed upon and are contained in the Pretrial Order.[1]

APPELLEE'S "ARGUMENT AS TO SPECIFICATION OF ERROR I"

In its argument under this heading, F.D.I.C. concedes that the principles announced by this court in *American Surety Co. v. Bank of California*[2] are correct and that "American Surety Co. v. Bank of California, supra, is good law * * *."[3]

F.D.I.C. attempts to avoid the fatal effect of the holding in that case upon its claim to the insurance proceeds in this action by arguing that the facts of this case are so different that the rule stated in *American Surety Co. v. Bank of California* is inapplicable.

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[1] R. 3-23.
[2] 44 F. Supp. 81; affirmed 133 F. (2d) 160.
[3] Appellee's Brief p. 15.

As "distinguishing features", F.D.I.C. asserts:

(1) Brown stole the Bank's funds not the depositors' and the Bank alone acquired a claim against Brown.

(2) The depositors acquired no claim against Brown and did not assign any claim to F.D.I.C.

(3) The foundation of its claim in this action is the Bank's claim against Brown, which was assigned to it.

(4) F.D.I.C. did not insure against Brown's dishonesty — it insured the Bank's deposits to the extent of $5,000.00 for each depositor.

(5) F.D.I.C. purchased the Bank's assets and it did not thereby discharge a debt. The purchase was for value.

(6) No personal judgment is sought against Appellant and she will suffer no loss.

(7) The equities are in favor of F.D.I.C. as against Appellant.

These alleged "distinguishing features" are practically the same as those urged by F.D.I.C. in the trial court. Its contentions in the court below are stated and answered in our opening brief at pages 11 to 14, inclusive.

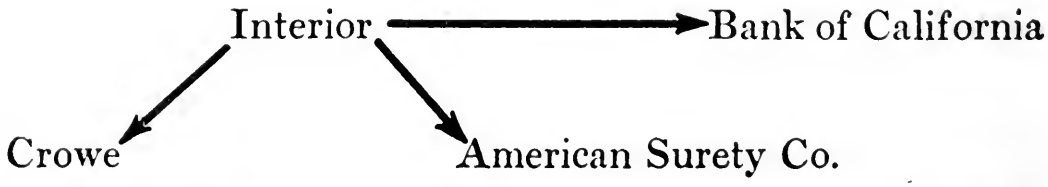
We will now discuss briefly the alleged "distinguishing features" now asserted.

Brown stole the Bank's funds not the depositors' and the Bank alone acquired a claim against Brown.

Because F.D.I.C. did not indicate in the trial court whether it was claiming that the stolen funds were depositors' funds or the Bank's funds, we assumed and analyzed both positions. Now that F.D.I.C. has elected to contend that the Bank's funds were stolen by Brown, a simplification of our diagram and argument is possible, which makes more certain the applicability to the facts of this case of the rule announced in *American Surety Co. v. Bank of California.*

F.D.I.C. does not deny that it is an insurer for a consideration. It proclaims that it insured the deposits of the Bank.[4] It concedes that under the "purchase" arrangement it "protected the depositors"[5] by paying out the difference between the remaining acceptable assets of the Bank and its total deposit liability.[6] In other words, shortages in the Bank's assets were restored with cash supplied by F.D.I.C.[7]

The diagram and explanation of the holding in *American Surety Co. v. Bank of California* is as follows:



Crowe, whose fidelity was insured by Interior with American Surety, wrongfully abstracted money from In-

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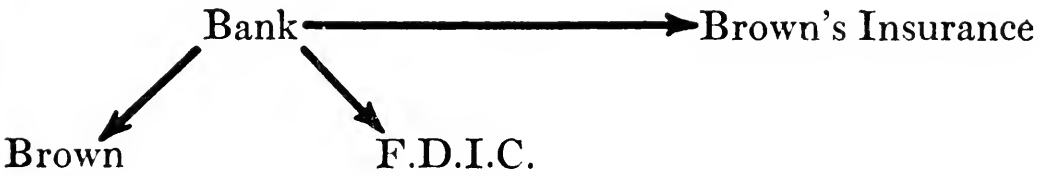
[4] Appellee's Brief p. 7.
[5] Appellee's Brief p. 7.
[6] Appellee's Brief p. 8.
[7] Appellee's Brief p. 11.

terior's account under circumstances making the Bank of California liable for the loss. Interior therefore had a claim for reimbursement against Crowe, American Surety and the Bank. It called upon the Surety Company to respond and it did so, taking an assignment of Interior's claim against the Bank. *Held* payment by the insurer extinguished the debt and it could not recover over against the Bank either by virtue of the assignment or subrogation.

The simplified diagram and explanation of the facts in this case, based on F.D.I.C.'s position that Bank funds were stolen by Brown, is as follows:



Brown wrongfully abstracted money from the Bank under circumstances making F.D.I.C. liable for the loss (to the extent of $5,000.00 for each depositor). The Bank therefore had a claim against Brown, a claim against F.D.I.C., and, assuming stolen money could be traced into the insurance premiums, a claim against Brown's insurance. The Bank called upon F.D.I.C. to respond and it did so, taking an assignment of all of the Bank's assets which included its claim-over against Brown's insurance.

It must be held that payment by the insurer extinguished the debt so that it does not hold by reason of assignment or subrogation any rights which the Bank might have had

over against Brown's insurance but for its payment of the claim.

The paragraph in our opening brief at page 9, which F.D.I.C. singles out for criticism, may likewise be rephrased in view of F.D.I.C.'s election to contend that Brown stole the Bank's funds and not the depositors, as follows:

> "In our case here, it is claimed that Brown wrongfully abstracted money from the Bank under circumstances making F.D.I.C. liable to the extent of $5,000.00 for each depositor. F.D.I.C. has responded and has made good the shortages in the depositors' accounts, taking an assignment of all the Bank's assets, including the Bank's right to follow stolen funds into the insurance proceeds. In this action, F.D.I.C. is attempting to assert the remedy which the Bank had to reach the proceeds of the policies on the life of the wrongdoer, assuming stolen funds can be traced into the premiums, and under the doctrine of the American Surety Co. case it must be held that when F.D.I.C. made good the shortages in the depositors' accounts that it merely did what it undertook to do for a consideration and therefore its payment discharged the debt and it can not aid its position or change the consequences by taking an assignment or anything else."

F.D.I.C. can no more reimburse itself by attempting to follow stolen funds into the premiums than American Surety Co. could reimburse itself by asserting Interior's claims against the Bank of California. While Interior, in the *American Surety Co.* case and the Bank in this case had an election whether to proceed against any one of three sources for reimbursement, when Interior and the Bank

called upon the insurer and it responded it could not, by virtue of an assignment from its insured, pursue any of the other remedies available to its insured prior to its exercise of its election.

American Surety Co. v. Bank of California cannot be distinguished and this court's ruling must be that Appellant is entitled to the proceeds of the policies.

The depositors acquired no claim against Brown and did not assign any claim to F.D.I.C.

In making this argument, F.D.I.C. has completely ignored the issue of law framed by the pretrial order which is the basis of this Specification of Error. The issue of law is:[8]

> "Whether Federal Deposit Insurance Corporation succeeded to or became subrogated to the Bank's rights, if any, as against the proceeds of the insurance policies upon the life of Edward N. Brown."

If F.D.I.C. had taken the position in the trial court and here that the funds stolen by Brown were the depositors' and not the Bank's, then it would have to show an assignment of the depositors' claims to follow the stolen funds into the insurance proceeds. Since F.D.I.C. now claims that what Brown stole was Bank funds and that it stands in the position of the Bank as assignee of its assets, it is apparent that the depositors had no claim against Brown since their money was not stolen by him and they would therefore have no claim against Brown, against F.D.I.C., as the insurer, or against the proceeds of Brown's insurance.

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[8] R. 26.

The Bank was the insured — it had a claim against Brown, against F.D.I.C., as the insurer, and against the proceeds of Brown's insurance, assuming stolen funds could be traced into the premiums.

This asserted "distinguishing feature" therefore disappears.

The foundation of its claim in this action is the Bank's claim against Brown, which was assigned to it.

F.D.I.C. is clearly wrong in its suggestion that the foundation of its claim in this proceeding is the Bank's claim against Brown, which it claims to hold as assignee. The fact is that the foundation of F.D.I.C.'s claim in this proceeding is the Bank's rights to follow stolen funds into the insurance proceeds which it is claimed the Bank assigned with all its other unacceptable assets to F.D.I.C. As has already been pointed out, when Brown died and the shortage was discovered, the Bank had three claims for reimbursement, any one of which it was entitled to follow. The first was the claim against Brown, which could be followed by making a claim against his Estate. The second was the claim against the insurer, F.D.I.C., to require it to respond on its obligation to restore the stolen funds to the extent of $5,000.00 for each depositor. The third was the right to trace stolen funds into the proceeds of Brown's insurance.

The Bank elected to call upon the insurer, F.D.I.C., and it responded, taking an assignment of the Bank's assets.

F.D.I.C. is not asserting in this action the Bank's claim against Brown's Estate but is attempting to assert the

third remedy which the Bank had to follow stolen funds into the insurance proceeds.

Under the doctrine of *American Surety Co. v. Bank of California,* the debt was extinguished when F.D.I.C. responded on its obligation and it cannot assert, by way of assignment, the right which the Bank had to follow stolen funds into the insurance proceeds.

Obviously the Bank's claim against Brown's Estate is not the foundation of F.D.I.C.'s claim in this proceeding and it is wholly erroneous in so asserting. In any event, the Bank having made the election to call on the insurer, no other remedies are open to it or to F.D.I.C., as its assignee.

F.D.I.C. did not insure against Brown's dishonesty—it insured the Bank's deposits to the extent of $5,000.00 for each depositor.

While it is true that in the *American Surety Co.* case the insurer merely undertook to make good any losses by reason of the infidelity of Interior's employee and while F.D.I.C. insured the Bank's deposits to the extent of $5,000.00 for each depositor, the event which caused the loss in both instances was the infidelity of the insured's employee.

The fact that F.D.I.C.'s obligation was broader than American Surety Co.'s does not furnish a basis for distinguishing the case, especially in view of the fact that both insurers responded because of an identical loss — theft by the insured's employee.

F.D.I.C., by so responding, can acquire no greater rights than American Surety Co. did and it must be held that payment by F.D.I.C., as the insurer, extinguished the debt and left it no right to reimburse itself by attempting to follow, by virtue of an assignment, any of the other remedies which the insured had prior to payment by the insurer.

F.D.I.C. purchased the Bank's assets and it did not thereby discharge a debt. The purchase was for value.

From time immemorial insurers have endeavored to acquire their insured's right to follow other claims for reimbursement, so as to reduce their loss.

In the *American Surety Co.* case the insurer took an assignment of Interior's right to recover against the Bank of California and attempted to assert it to reduce its loss.

In this case, F.D.I.C. attempted to invest itself *by assignment* with the right which the Bank had, prior to calling upon F.D.I.C. to respond, to reimburse itself by following stolen funds into the insurance proceeds.

Since F.D.I.C. is admittedly an insurer for a consideration, since it admittedly responded and paid the loss, it merely did what it had contracted to do. It cannot reduce its loss by attempting to assert any other remedy which the Bank, as its insured, had to reimburse itself prior to calling upon F.D.I.C. to respond.

While F.D.I.C. claims that it "purchased" the unacceptable assets of the Bank, it is interesting to note that the "purchase price" was measured by the difference between

the remaining acceptable assets of the Bank and its total deposit liabilities, so that by "purchasing" it merely replaced the loss.

It is interesting to note further that the "purchase price" did not go to the Bank but went to The United States National Bank, which assumed the deposit liabilities of the Bank.

It is interesting to note, in addition, that F.D.I.C. compelled the Bank to give it a note for $800,000.00[9] so that instead of the Bank receiving anything in the so-called "purchase", it turned over its unacceptable assets to F.D.I.C., which gave the "purchase price" to The United States National Bank and the Bank was compelled to give its note to offset the so-called "purchase price" which it didn't even receive!

Obviously, the so-called "purchase" was conceived for the sole purpose of attempting to void the effect of *American Surety Co. v. Bank of California,* which F.D.I.C. now proclaims is good law.

When the shortage was discovered, F.D.I.C. was obligated to respond under its contract, it did respond, it cannot aid its position by claiming that it "purchased" the unacceptable assets of the Bank. It is admittedly attempting to assert the Bank's claim to follow stolen funds into the insurance proceeds by virtue of an assignment from the Bank.

The assignment can help it no more than the assign-

[9] R. 111.

ment of Interior's claim against the Bank of California to American Surety Co. aided the surety company in *American Surety Co. v. Bank of California.*

No personal judgment is sought against Appellant and she will suffer no loss.

F.D.I.C. attempts to distinguish this case from *American Surety Co. v. Bank of California* by claiming that no personal judgment is sought against Appellant and that she will suffer no loss. It is inconceivable to us that F.D.I.C. can seriously contend that Appellant will suffer no loss if she is deprived, in this proceeding, of the proceeds of the insurance policies in which she was named the beneficiary. While it is true that no personal judgment is sought against Appellant, that is because the fund to which she is entitled under the contracts of insurance is being held in the registry of the court to abide the final decision herein. Had the proceeds of the policies been paid to Appellant prior to the institution of this proceeding, F.D.I.C. would have been seeking a personal judgment against Appellant requiring her to turn over to it the money which she received.

Obviously, this alleged "distinguishing feature" has no merit in it.

The equities are in favor of F.D.I.C. as against Appellant.

The language of this court in *American Surety Co. v. Bank of California* answers this sugested distinguishing feature better than any argument we can supply. It is as follows:[10]

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[10] 133 F. (2d), pp. 162, 163 and 164.

"The right of subrogation is a creature of equity, applicable where one person is required to pay a debt for which another is primarily responsible, and which the latter should in equity discharge. In theory one person is substituted to the claim of another, but only when the equities as between the parties preponderate in favor of the plaintiff. * * * A surety may pursue the independent right of action of the original creditor against a third person, *but it must appear that said third person participated in the wrongful act involved or that he was negligent,* for the right to recover from a third person is merely conditional in contrast to the right to recover from the principal which is absolute. The equities of the one asking for subrogation must be superior to those of his adversary. If the equities are equal or if the defendant has the greater equity, subrogation will not be applied to shift the loss.

* * *

"In the instant case the surety contracts are confined to Insurers and Interior. Any right of recovery against third parties for money paid Interior by Insurers under the contracts must rest solely upon a weighing of the equities as between the third parties and Insurers. *Such equities generally depend upon participation in wrongdoing, negligence, or knowledge,* although we do not mean to say that these expressions cover the gamut of equities which may or should be considered.

* * *

"In all of the situations outlined defendants had actual knowledge of facts sufficient to put them on notice of the wrongdoing and in a way, therefore, were implicated in the wrong done. * * * No indication is found that Bank knew any facts which would suggest the fraud of an employee of its depositor. Insurers, on the other hand, expressly contracted to se-

> cure Interior against losses caused by a dishonest employee, such as Crowe. They accepted the responsibility for such losses for a compensation, the premiums paid to them, which they have retained. Both they and Bank are innocent of any wrongdoing, although all were liable to Interior (under assumption of Bank's liability to Interior) on the basis of independent contract obligations—the implied contract of Bank to pay only to those entitled, and the contracts of Insurers to indemnify against losses caused by a defalcating employee. Since Insurers expressly, voluntarily and for a compensation guaranteed against loss in the exact situation involved, the equity in the situation cannot lie in favor of Insurers and against Bank for the payment made."

It is conceded in this case that Appellant knew nothing of her son's wrongdoing. She was not negligent in any way. There is no possible way that F.D.I.C. can claim that the equities are in its favor as against her.

The *American Surety Co.* case is controlling and it must be held that F.D.I.C. has no claim to the proceeds of the policies. A judgment awarding all of the proceeds to Appellant must enter.

APPELLEE'S ARGUMENT UNDER SPECIFICATION OF ERROR II

In an effort to sustain the trial court's opinion and to answer the authorities and argument which we have presented under this Specification of Error, F.D.I.C. contends. (1) that the burden of proving that the premiums were paid with Brown's own funds is upon Appellant, (2) that automatic setoff operated to extinguish Brown's

own funds in his accounts when the premium checks cleared, and (3) Federal Public Policy estops Appellant from claiming the funds.

THE BURDEN OF PROOF

Only two cases are relied upon to place the burden of proof upon Appellant. They are *McConnell v. Henochsberg,* 11 Tenn. Appeals 176, and *Meyers v. Baylor University,* 6 S. W. (2d) 393. In our opening brief, we have already demonstrated conclusively that neither case supports F.D.I.C.'s position in this regard and, since the authorities cited in our opening brief have not been answered or distinguished, it must be held that the burden of proof was upon F.D.I.C.

F.D.I.C. argues for, but fails to support with authority, its theory that Brown's death does not dispense with the rule requiring the wrongdoer to separate the fund. As we pointed out in our opening brief, not one single case exists which invokes a presumption in favor of a beneficiary attempting to trace trust funds where the trustee or wrongdoer is dead.

Since in this case the items in Brown's accounts when the premium checks cleared are agreed upon and *since not one single cent of stolen funds have been traced into the bank accounts at any time,* much less when the premium checks cleared, the situation is exactly the same as if Brown were alive and he had explained that the items in his accounts when the checks cleared were his own funds. Such a showing would require a finding in Appellant's favor and

the facts having been stipulated and there being no evidence that even one cent of embezzled funds was placed in these bank accounts, Appellant must be awarded the proceeds of the policies.

In argument, F.D.I.C. suggests that the lands which Brown purchased, his cattle and grain operations and the bank accounts concerned were conducted and maintained with stolen funds *yet not one cent of stolen money is traced into the real property he admittedly owned, into the steer or grain accounts or into the bank accounts involved.* The fact that F.D.I.C. is unable to trace any of the stolen money into any of Brown's assets or accounts is conclusive proof that they did not so originate and that the admitted assets which he had were the proceeds of his own funds — not stolen funds.

If it should be finally held that the burden is upon Appellant to show that the funds which were in his accounts when the premium checks cleared were Brown's and not stolen moneys, that burden has been met by the stipulated evidence which details the items which were in his accounts at the time the checks cleared — not one of which can be claimed to be stolen funds or the proceeds of stolen funds.

It has never been held that all a beneficiary must do in order to trace trust funds is to show that the trustee failed to deliver up the trust estate. A beneficiary is not entitled to touch anything left by the trustee in the absence of evidence tracing the fund. The rule contended for would permit the confiscation of everything the trustee owned even though acquired with his own funds.

Nothing short of placing the burden of proof upon Appellant can sustain the trial court's opinion. The only issue for this court to decide on this point is whether the beneficiary has the obligation of tracing the trust funds before trust property or the proceeds of trust property can be recovered. If tracing is required (and it has been required in every reported case), then F.D.I.C.'s claim to the proceeds must fail. The trial court itself held that stolen moneys were not traced into the accounts and, in fact, they were not traced into anything that Brown had at the time of his death. The judgment awarding F.D.I.C. the proceeds of the policies must be reversed and the fund awarded to Appellant.

F.D.I.C.'S THEORY OF AUTOMATIC SETOFF

A careful examination of Appellee's brief fails to disclose any case supporting its theory of automatic setoff, which would extinguish the balances in Brown's accounts at the time the premium checks cleared. *McConnell v. Henochsberg* was the only case relied upon by the trial court. It is clearly distinguishable as we have pointed out in our opening brief and no other case supporting the theory exists or has been brought forth.

It is only necessary to examine the consequences which would follow the establishment of a theory of automatic setoff in order to demonstrate that it cannot exist.

If it be assumed that everything which Brown himself owned and deposited in his accounts could be thus extin-

guished, F.D.I.C. could recover from every single person who ever accepted a check from Brown on any of his accounts in the Bank. Even though Brown purchased groceries by drawing a check against his bank account when admittedly only his own funds were in the account, F.D.I.C. could require the grocer to pay back the amount received.

The doctor, the lawyer, the druggist and every other person would be subject to being deprived of payment made to them for services performed and everything Brown himself owned could be confiscated to offset the claim for moneys stolen by him from the Bank.

No one could ever accept any check from any bank employee without being liable to return the funds so received should it at some later date develop that the bank employee had stolen some bank funds. The negotiability of checks would be destroyed.

Such a theory has never been announced before — it cannot be accepted and affirmed by this court. The very essence of following trust funds is to trace them into the property sought to be charged with the trust. If automatic setoff were adopted, not only would tracing be not required but even property admittedly free from any taint of trust could be recovered to offset the wrongful depletion of the trust fund.

Every single case recognizes the right of the trustee to have and use his own funds. If automatic setoff were adopted, every decided case would be overruled and a theory

permitting the confiscation of a trustee's own funds to replace stolen trust funds would be substituted.

The complete absence of evidence tracing even one cent of embezzled funds into Brown's bank accounts cannot be held to furnish the foundation for a recovery in favor of F.D.I.C.

FEDERAL PUBLIC POLICY

F.D.I.C. argues that Appellant is estopped to claim that the funds in Brown's bank accounts at the time the checks in payment of the premiums cleared were his own funds. The agreed facts establish that the funds in Brown's accounts when the premium checks cleared were his own. F.D.I.C. may not rely upon Federal Public Policy to confiscate Brown's own property acquired with his own funds.

The public policy which governs this case has been established for centuries in the rule which requires a beneficiary to actually trace trust moneys into property sought to be recovered for the trust fund. No policy exists which would warrant the establishment of a rule which would excuse a beneficiary from tracing trust funds when the trusee is dead.

F.D.I.C. is free to recover every single penny of stolen funds to reimburse itself. It is not entitled to one cent of Brown's own funds to offset its loss. Whenever trust funds can be traced into property or bank accounts, F.D.I.C. is entitled to recover. In this case, since not one cent of embezzled funds was traced into Brown's bank accounts or into the premium payments, F.D.I.C. is not entitled to recover.

APPELLEE'S ARGUMENT UNDER SPECIFICATION OF ERROR III

Our position in connection with this Specification is adequately presented in our opening brief. The question whether any indebtedness exists is not one which is subject to argument or debate. An audit of the books will be conclusive on the question. Since it affects the whole basis of the trial court's holding, Appellant is entitled to have the decision rest upon the true facts.

CONCLUSION

F.D.I.C. has failed to distinguish any of the cases relied upon by Appellant on this appeal. The judgment should be reversed and the fund in the registry of the court awarded to Appellant.

Respectfully submitted,

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No. 11007

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

MIGUEL MORACHIS, Owner and Claimant of one Plymouth Truck, 1940 Pickup, Motor No. T-105-2887, Model PT 105, Sr. 9209823,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Arizona

Rotary Colorprint, 661 Howard Street, San Francisco 60—5-18-45

No. 11007

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,
Appellant,

vs.

MIGUEL MORACHIS, Owner and Claimant of one Plymouth Truck, 1940 Pickup, Motor No. T-105-2887, Model PT 105, Sr. 9209823,
Appellee.

Transcript of Record

Upon Appeal from the District Court of the United States for the District of Arizona

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ATTORNEYS OF RECORD

FRANK E. FLYNN, Esquire,

United States Attorney,
Phoenix, Arizona.

JOHN P. DOUGHERTY, Esquire,

Assistant United States Attorney,
Tucson, Arizona.

Attorneys for Appellant.

RUFFO ESPINOSA, Esquire,

Nogales, Arizona,

Attorney for Appellee.

In the District Court of the United States
for the District of Arizona

No. Civil—245—Tucson

UNITED STATES OF AMERICA,

Libelant,

vs.

7 BOXES LEMONS, 307 Lbs. Gross; 2 BOXES GRAPEFRUIT, 92 Lbs. Gross; 10 CASES CANNED MILK, 48 cans ea., 14½ oz. net weight each, and ONE TRUCK, 1940 PICK-UP, MOTOR No. T-105-2887, PLYMOUTH MODEL PT105, SR. 9209823,

Respondents.

JUDGMENT

The Libel of Information of the United States for the forfeiture of the above-described property having been filed herein on the 10th day of June, 1944, and due process having issued thereon and due notice thereof having been made, and no claim to said 7 Boxes Lemons, 307 Lbs. Gross; 2 Boxes Grapefruit, 92 Lbs. Gross, and 10 Cases Canned Milk, 48 cans ea., 14½ oz. net weight each, having been made in due time and no answer or petition having been filed, in accordance with the rules and practices of this Court, and the time to file such claim and appearance having expired the default thereof is hereby entered, and it further appearing that one Miguel Morachis in due time appeared and filed herein his verified petition claiming that he is the owner of said 1940 Plymouth

Truck and requesting that the same be restored to him, and the Court having heard the evidence and being fully advised in the premises,

It Is Ordered, Adjudged and Decreed that the said 7 Boxes Lemons, 307 Lbs. Gross; 2 Boxes Grapefruit, 92 Lbs. Gross, and 10 Cases Canned Milk, 48 cans ea., 14½ oz. net weight each, be and the same are hereby forfeited to the United States of America for the reasons stated in the Libel, and

It Is Further Ordered, Adjudged and Decreed that the United States Marshal for the District of Arizona deliver the said ten cases of canned milk to the Warden of the Federal Prison Camp, Tucson, Arizona, or his duly authorized representative; and

It Is Further Ordered that the proceeds from the sale of the said 7 Boxes Lemons and 2 Boxes Grapefruit, heretofore deposited with the Clerk of this Court by the Marshal be disposed of according to law, and

It Is Further Ordered, Adjudged and Decreed that the petition of said Miguel Morachis for the restoration of said respondent, 1940 Plymouth Truck to him, the owner thereof, be and the same is hereby granted.

Dated this 27th day of January, 1945.

ALBERT M. SAMES
United States District Judge

[Endorsed]: Filed Jan. 27, 1945.

[Title of District Court and Cause.]

ASSIGNMENTS OF ERROR

1. The Court erred in ordering restoration of the respondent, one Plymouth Truck pickup automobile, 1940 model, to petitioner, Morachis.

2. The Court erred in failing to hold the aforesaid 1940 pickup truck for forfeiture to the United States.

3. The Court erred in failing to order forfeiture of the aforesaid 1940 pickup Plymouth truck to the United States.

4. The Court erred in holding that Title VI of the Act of June 15, 1917, Chapter 30, 40 Stat. 223, as amended did not provide forfeiture of the vehicle containing the lemons, grapefruit and canned milk under the circumstances revealed in the findings of fact herein.

5. The Court erred in finding that the aforesaid 1940 pickup Plymouth truck was not being taken out of the United States in violation of law within the meaning of Title VI of the Act of June 15, 1917, Chapter 30, 40 Stat. 223 as amended, (46 U.S.C. §401-407 incl.).

F. E. FLYNN
United States Attorney
JOHN P. DOUGHERTY
Assistant United States
Attorney

[Endorsed]: Filed Feb. 1, 1945.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America, libelant above-named, hereby appeals to the Circuit Court of Appeals for the Ninth Circuit from the Judgment entered herein on the 27th day of January, 1945, granting the petition of Miguel Morachis for the restoration to him of the 1940 Plymouth truck.

Signed F. E. FLYNN
United States Attorney
JOHN P. DOUGHERTY
Asistant U. S. Attorney, Attorney for Appellant,
412 Federal Building, Tucson, Arizona.

[Endorsed]: Filed Feb. 1, 1945.

[Title of District Court and Cause.]

PETITION FOR ALLOWANCE
TO APPEAL

Comes now the Libelant, the United States of America, by F. E. Flynn, United States Attorney for the District of Arizona and petitions the Court for an allowance to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment of this Court, in the above-entitled case, granting the petition of Miguel

Morachis for the restoration of the respondent 1940 Plymouth Truck.

F. E. FLYNN
United States Attorney
JOHN P. DOUGHERTY
Assistant U. S. Attorney
Attorney for Libelant.

[Endorsed]: Filed Feb. 1, 1945.

[Title of District Court and Cause.]

ORDER

It appearing to the Court that the petition of F. E. Flynn, United States Attorney for the District of Arizona, on behalf of the libelant herein for an allowance to appeal to the United States Circuit Court of Appeals for the Ninth Circuit from the final judgment of this Court in the above-entitled case granting the petition of Miguel Morachis for the restoration of one 1940 Plymouth Truck has been filed herein,

It Is Therefore Ordered that the said petition be, and the same is, hereby allowed.

Dated this 7th day of February, 1945.

ALBERT M. SAMES
United States District Judge

[Endorsed]: Filed Feb. 7, 1945.

[Title of District Court and Cause.]

ORDER—STAY OF EXECUTION

It appearing to the Court that an appeal has been taken by the United States of America from that part of the final judgment of this Court entered herein granting the petition of claimant for the restoration of that certain 1940 Plymouth Truck and a Petition for Stay of Execution has been filed on behalf of said United States.

It Is Therefore Ordered that the operation and enforcement of said Judgment, in so far as it includes that 1940 Plymouth Truck, is stayed pending the result of said appeal in the Circuit Court of the United States for the Ninth Circuit.

ALBERT M. SAMES
United States District Judge

[Endorsed]: Filed Feb. 7, 1945.

In the District Court of the United States
for the District of Arizona

No. Civil—245—Tucson

UNITED STATES OF AMERICA,

Libelant,

vs.

7 BOXES LEMONS, 307 Lbs. gross; 2 BOXES GRAPEFRUIT, 92 Lbs. gross; 10 CASES CANNED MILK, 48 cans ea., 14½ oz. net weight each, and ONE TRUCK, 1940 PICK-UP, MOTOR No. T-105-2887, PLYMOUTH MODEL PT105, SR. 9209823,

Respondents,

MIGUEL MORACHIS,

Claimant.

CITATION ON APPEAL

To: Ruffo Espinosa, Proctor for Miguel Morachis, the claimant herein:

Greeting:

You Are Hereby Cited and Admonished to be and appear in the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the City of San Francisco, State of California, forty (40) days from and after the date of this citation, pursuant to an order allowing an appeal duly made and entered and filed in the office of the Clerk of the above-named District Court under date of February 7, 1945, wherein the United States of America

is appellant and Miguel Morachis is appellee, to show cause, if any there be, why the judgment rendered against said appellant on January 27, 1945, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Dated at Tucson, Arizona, this 8th day of February, 1945.

ALBERT M. SAMES
Judge, United States District Court for the District of Arizona.

Service of the above Citation upon Ruffo Espinosa, Proctor for said Miguel Morachis, at Nogales, Arizona, on the 10th day of February, 1945, is hereby acknowledged.

RUFFO ESPINOSA
Proctor for Appellee

[Endorsed]: Filed Feb. 12, 1945.

[Title of District Court and Cause.]

AGREED STATEMENT

Comes now the Libelant herein, the United States of America, by its proctor F. E. Flynn, United States Attorney for the District of Arizona, and the Claimant of said 1940 Plymouth truck, Miguel Morachis, by his proctor Ruffo Expinosa, under Rule 5, paragraph 4, of the Rules of Admiralty of the United States Circuit Court of Appeals for the Ninth Circuit, and stipulate and agree that the Findings of Fact, in the above-entitled

case, by Judge Albert M. Sames, Judge of the United States District Court for the District of Arizona, are true and complete statements of all the essential facts that were averred, proved, and sought to be proved, in the proceedings of the trial of this case, and that the same are as follows:

1. That on or about the 3rd day of June, 1944, at the Port of Nogales, Arizona, the Collector of Customs seized the following described property, to-wit: 7 boxes lemons, 307 lbs. gross; 2 boxes grapefruit, 92 lbs. gross; 10 cases canned milk, 48 cans ea., 14½ oz. net weight each, and one truck, 1940 Pickup, Motor No. T-105-2887, Plymouth Model PT105, SR. 9209823, upon the grounds that the said food products were then and there about to be exported, shipped from or taken out of the United States of America in the said vehicle without any special export license having been issued by Foreign Economic Administration under the Export Control Act of 1940, as amended, and on the further ground that the truck contained articles about to be exported, shipped from or taken out in violation of law, and that the said truck was intended to be used for said exportation.

2. That within ten days after the seizure of said property an application on oath was duly filed and a warrant for further detention of the 1940 Plymouth truck and the lemons, grapefruit and canned milk was issued by this United States District Court on June 7, 1944, herein.

3. That within 30 days after said seizure a verified petition was filed in this Court by Miguel

Morachis claiming that he was the owner of said Plymouth Truck and that said truck was not intended to be exported from the United States of America to the Republic of Mexico and requesting that said truck be restored to him.

4. That no petition was filed within 30 days after said seizure for the restoration of the 7 boxes of lemons, 307 lbs. gross, 2 boxes grapefruit, 92 lbs. gross, and 10 cases canned milk, 48 cans each, 14½ oz. net weight each.

5. Miguel Morachis at the time of the seizure here involved had an office in the wholesale fruit office in Nogales, Arizona, where he bought produce. He was then in the business of buying and selling produce and shipping it from the United States into Mexico.

6. That on said day of June 3, 1944, the employees of said Miguel Morachis who were conducting his business in his absence arrived at the Customs Station at Nogales, Arizona, with the said Plymouth Truck containing the aforesaid lemons, grapefruit and canned milk and presented to the Customs Inspector a Shipper's Export Declaration to export 3 crates of celery, 2 boxes of sweet potatoes, 20 boxes of fresh bread and 10 cases of apples.

7. That in examining the contents of the said Plymouth Truck, the Inspector found concealed beneath the bread in separate bread cartons 10 cases of canned milk which had not been declared and further examination revealed that the boxes labelled "apples" actually contained lemons and grapefruit.

8. That one of the employees arriving with the truck as aforesaid, one Rodolpho Tapia, shipping clerk and secretary of said Miguel Morachis, was in complete charge of the business of said Morachis. He was in charge of making purchases and the exportation back and forth. Morachis just checked the bills every month or so.

9. That the said employees of Miguel Morachis were instructed by Rodolpho Tapia to attempt the smuggling and that said Tapia admitted that he had no license to export the said milk, grapefruit or lemons and had attempted to smuggle the produce across the border.

10. That the said undeclared, concealed and falsely declared milk, grapefruit and lemons were, at the time of seizure, about to be exported from or taken out of the United States in violation of law and without a special license therefor having been issued by the Foreign Economic Administration.

11. That the said Plymouth Truck, registered under the laws of Arizona, was in constant daily use between Nogales, Mexico and Nogales, Arizona, for a period of about two years prior to the date of seizure, shipping produce from the United States into Mexico.

12. That said Plymouth Truck was used in this instance in an attempt to carry articles out of the United States without the required export license.

13. That on the 10th day of June, 1944, a libel of forfeiture was filed herein against the Plymouth

Truck and the lemons, grapefruit and canned milk proceeded against herein.

14. The 1940 Plymouth Truck here proceeded against was used by Morachis and his aforesaid employees at Nogales, Arizona, in their produce business.

15. For the four or five months previous to the seizure Morachis had not driven the truck as he was busy on other matters. The truck at the time of seizure was being driven by Tapia.

16. When the truck, canned milk, lemons and grapefruit were seized, the truck was going from the United States into Mexico, and the contents of the truck were being shipped into Mexico.

17. The value of the canned milk was around $50.00.

18. There was no declaration of the aforesaid milk, grapefruit and lemons before or at the time of the aforesaid seizure.

19. No individual, general, program or special project license is shown to have been obtained from Foreign Economic Administration for the aforesaid exportation or taking out of the lemons, canned milk and grapefruit.

20. The aforesaid employees of Morachis, who were conducting his business with his consent in his absence, used the aforesaid Plymouth Truck with the intention of, and as a means of, exporting or taking out of the United States and into Mexico the aforesaid lemons, grapefruit and canned milk without having declared said lemons, grapefruit and canned milk.

Then upon such Findings of Fact the trial Court made the following Conclusions of Law, which Libelant contends are not justified by the law and the evidence:

Now therefore this Court concludes that the said 7 boxes of lemons, 307 lbs. gross, 2 boxes grapefruit, 92 lbs. gross, and 10 cases canned milk, 48 cans each, 14½ oz. net weight each were, at the time of seizure, about to be exported from the United States into the Republic of Mexico in violation of the Export Control Act of 1940, as amended, and are subject to forfeiture to the United States herein;

And this Court further concludes that the said Plymouth Truck was not about to be exported, shipped from or taken out of the United States into the Republic of Mexico in violation of law.

And further that Title VI of the Espionage Act of 1917, (22 U.S.C. 401-407 incl.) does not authorize forfeiture of a vehicle containing articles about to be unlawfully exported or taken from the United States but only authorizes seizure and detention of the vehicle so used.

The Libelant contends that the Assignments of Error, accompanying this Petition, contain a concise statement of the points relied upon by it to reverse the Judgment of the trial Court.

It Is Further Stipulated that the Transcript of Record shall include the Assignments of Error, Notice of Appeal, Petition for Order Allowing Appeal, Order Allowing Appeal, Order Staying Ex-

ecution, Citation, and this Agreed Statement, and Order Extending Time for filing record.

Witness our hands this 6th day of March, 1945.

F. E. FLYNN
United States Attorney
JOHN P. DOUGHERTY
Assistant U. S. Attorney
Proctor for Libelant
RUFFO ESPINOSA
Proctor for Claimant

[Endorsed]: Filed March 6, 1945.

[Title of District Court and Cause.]

ORDER EXTENDING TIME

On the motion of John P. Dougherty, Assistant United States Attorney, attorney for the Appellant in the above-entitled case, it is hereby ordered that the time for filing the record on appeal and docketing the action be, and the same is, hereby extended to and including the 26th day of March, 1945.

Dated: March 5th, 1945.

ALBERT M. SAMES
United States District Judge

[Endorsed]: Filed March 5, 1945.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO TRANSCRIPT OF RECORD

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am custodian of the records, papers and files of the said Court, including the records, papers and files in the case of The United States of America, Plaintiff, versus One Truck, 1940 Pickup, et al, Respondents, numbered Civil—245—Tucson, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 19, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the endorsements of filing thereon, called for and designated in the Agreed Statement filed in said cause and made a part of the transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said transcript of record amounts to the sum of $4.40, and that a memorandum of said sum has been entered in said cause by me for services rendered on behalf of the United States.

I further certify that the original citation issued in the said cause is hereto attached and made a part of this record.

Witness my hand and the Seal of the said Court this 15th day of March, 1945.

(Seal) EDWARD W. SCRUGGS
Clerk.

[Endorsed]: No. 11007. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Miguel Morachis, Owner and Claimant of one Plymouth Truck, 1940 Pickup, Motor No. T-105-2887, Model PT105, Sr. 9209823, Appellee. Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed March 19, 1945.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

In the United States Circuit Court of Appeals
for the Ninth Circuit

No. 11007

UNITED STATES OF AMERICA,

Appellant,

vs.

7 BOXES LEMONS, 307 lbs. gross; 2 BOXES GRAPEFRUIT, 92 lbs. gross; 10 CASES CANNED MILK, 48 cans each, 14½ oz. net weight each, and ONE TRUCK, 1940 PICK-UP, MOTOR No. T-105-2887, PLYMOUTH MODEL PT105, SR. 9209823,

Appellee,

MIGUEL MORACHIS,

Claimant.

STATEMENT OF POINTS AND DESIGNATION OF RECORD

Now comes the appellant herein by his Proctor, Frank E. Flynn, United States Attorney for the District of Arizona, and designates the agreed statement heretofore signed and submitted by the Proctors for both appellant and appellee, as embracing all the record necessary for the consideration of this appeal.

Said appellant hereby desires to adopt as his

points on appeal the assignments of error he heretofore made and that are included in said records.

FRANK E. FLYNN,
United States Attorney
JOHN P. DOUGHERTY
Assistant U. S. Attorney
Proctor for Appellant.

Ruffo Espinosa, Proctor for appellee and the claimant, consents that the above designation of the record is final and complete.

RUFFO ESPINOSA
Proctor for Appellee and
Claimant.

[Endorsed]: Filed March 29, 1945. Paul P. O'Brien, Clerk.

No. 11007

United States
Circuit Court of Appeals
For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

MIGUEL MORACHIS, Owner and Claimant of one Plymouth Truck, 1940 Pickup, Motor No. T-105-2887, Model PT 105, Sr. 9209823,

Appellee.

SUPPLEMENTAL
Transcript of Record

Upon Appeal from the District Court of the United States for the District of Arizona

Rotary Colorprint, 661 Howard Street, San Francisco

No. 11007

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED STATES OF AMERICA,

Appellant,

vs.

MIGUEL MORACHIS, Owner and Claimant of one Plymouth Truck, 1940 Pickup, Motor No. T-105-2887, Model PT 105, Sr. 9209823,

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In the District Court of the United States
for the District of Arizona

No. Civil—245—Tucson

UNITED STATES OF AMERICA,

Libelant,

vs.

7 boxes lemons, 307 lbs. gross; 2 boxes grapefruit, 92 lbs. gross; 10 cases canned milk, 48 cans ea.; 14½ oz. net weight each, "Pet" and "Carnation" brands, and one truck, 1940 Pickup, Motor No. T-105-2887, Plymouth Model PT 105, Sr. 9209823,

Respondents.

AFFIDAVIT FOR WARRANT OF DETENTION OF SEIZED PROPERTY

United States of America,
District of Arizona—ss.

William H. Shane, being first duly sworn, deposes and says: that he is a Customs Inspector stationed at Nogales, Arizona; that he was so engaged on June 3, 1944; that since that day he has been on duty in such official capacity at Nogales, Arizona; that on June 3, 1944, Roberto Sanchez Cuevas and Alfredo Grijalva, truck drivers for Miguel Morachis of Nogales, Arizona, arrived at the Customs Inspection Station and presented two export declarations to support the exportation of three crates, 210 pounds, celery, two boxes, 70 pounds, sweet potatoes, twenty boxes, 540 pounds bread,

and ten boxes 480 pounds, of apples. A license from the Board of Economic Warfare was required for the apples, which they presented. Upon examination of the load of merchandise Inspector William H. Shane found that the boxes labeled apples contained grapefruit and lemons; further examination of the load disclosed that five of the twenty boxes labeled bread, contained canned milk, Carnation and Pet Brands. The truck drivers admitted that it was a deliberate attempt to smuggle the merchandise and that they had been so instructed by their immediate superior, Rodolfo Tapia Montano, shipping clerk and secretary for Miguel Morachis. Rodolfo Tapia Montano stated that they had endeavored to smuggle the fruit and canned milk because they had no license to export same; that on June 3, 1944, the truck, grapefruit, lemons, and the canned milk were seized, detained, and remain in the custody of the Collector of Customs, United States Customs District No. 26, Nogales, Arizona, because said merchandise was being exported in said truck in violation of the Export Control Regulations and as provided in Section 401, Title 22, U. S. C. A., pursuant to order of the Foreign Economic Administration, dated January

10, 1944, issued under the act of July 2, 1940, as amended June 30, 1942, 50 U. S. C. 701.

W. H. SHANE.

Subscribed and sworn to before me this 6th day of June, 1944.

[Seal] E. K. CUMMING,
United States Commissioner,
District of Arizona.

[Endorsed]: Filed Jun. 7, 1944.

In the United States District Court for the District of Arizona

May, 1944, Term at Tucson

Minute Entry of Wednesday,

June 7, 1944

Honorable Albert M. Sames, United States District Judge, presiding.

[Title of Cause.]

It Is Ordered that a warrant for the detention of the seized property issue.

[Title of District Court and Cause.]

EXCERPT OF DOCKET ENTRIES

1944

June 7. File affidavit for warrant of detention of seized property.

June 7. Order Warrant of detention issue.

June 7. Issue warrant of detention.

[Title of District Court and Cause.]

INFORMATION OF LIBEL

(For the forfeiture and condemnation of goods sought to be exported in viol. 50 USC 701, USA a party, Federal question.)

To the Honorable Albert M. Sames, Judge of the Said Court:

Now comes the United States of America by Assistant United States Attorney John P. Dougherty, its attorney, and alleges on information and belief as follows:

I.

That on or about the 3rd day of June, 1944, at the Port of Nogales, Arizona, 7 boxes Lemons, 307 lbs. gross; 2 boxes Grapefruit, 92 lbs. gross; 10 cases Canned Milk, 48 cans ea., 14½ oz. net weight each "Pet" and "Carnation" brands, and One Truck, 1940 Pickup, Motor No. T-105-2887, Plymouth Model PT105, Sr. 920923, were attempted to be exported or shipped from, or taken out of the United States of America in violation of law, and with the intention that said articles be exported, or

shipped from, or taken out of the United States of America, in violation of law.

II.

That the said articles were not manifested, and no export license for the said articles was presented to the Collector of Customs.

III.

The exportation of said articles are prohibited by the provisions of 50 USC 701, and Proclamations, Executive Orders and Regulations issued pursuant to said statute and supplements and amendments thereto.

IV.

No export license had been issued for the exportation of said articles although licenses for the exportation of the same are required by the aforesaid Statutes, Proclamations, Executive Orders and Regulations.

V.

That on or about the 3rd day of June, 1944, the Collector of Customs at Nogales, Arizona, pursuant to the authority of 22 USC 238 and 402, seized and detained the said articles and retained and still retains possession thereof for further disposition as may be provided by law.

VI.

That thereafter, with due diligence and on or about the 7th day of June, 1944, said collector of Customs applied to the Honorable Judge of the United States District Court for the District of Ari-

zona, under 22 USC 239 and 402, for a warrant to justify the further detention of such property; and on the 7th day of June, 1944, the said Judge, having been satisfied that the seizure was justified, issued his warrant accordingly, pursuant to the authority of 22 USC 239 and 402, and the said property has since been detained by said Collector for disposition according to law.

VII.

That more than thirty days have passed since the seizure of said articles, and no owner or claimant has filed a petition for restoration of the whole or any part thereof.

VIII.

That the Attorney General of the United States has directed the United States Attorney for this District to institute a libel proceeding in this Court against said articles, to forfeit and condemn said articles to the United States of America, pursuant to 22 USCA 241 and 404.

IX.

That by reason of the premises and the same being contrary to the form of the statute or statutes of the United States in such cases provided, and the Proclamations, Executive Orders and Regulations issued by authority of law, the said Articles became and are forfeited to the United States of America.

Wherefore, libelant prays that process in due form of law be issued to enforce said forfeiture and condemnation against the aforesaid articles citing

all persons having or claiming any interest in the said articles to appear upon the return day and show cause why the condemnation and forfeiture should not be decreed; and that the aforesaid articles be condemned and forfeited to the United States of America and be ordered disposed of as provided by law and that the libelant have such other and further relief in the premises as the Court shall deem just.

F. E. FLYNN,
United States Attorney.
JOHN P. DOUGHERTY,

Assistant U. S. Attorney, Attorney for Libelant,
412 Federal Building, Tucson, Arizona.

United States of America,
District of Arizona—ss.

John P. Dougherty, being first duly sworn, deposes and says that he is an Assistant United States Attorney for the District of Arizona; that he has read the foregoing libel of information and knows the contents thereof, and that he believes the same to be true in substance and in fact.

JOHN P. DOUGHERTY.

Subscribed and sworn to before me this 10th day of June, 1944.

[Seal] SHIRLEY M. YOUNG,
Deputy Clerk, U. S. District Court for the District of Arizona.

[Endorsed]: Filed Jun. 10, 1944.

[Title of District Court and Cause.]

ATTACHMENT AND MONITION

The President of the United States of America, to the Marshal of the District of Arizona, Greeting:

Whereas, an Information of Libel has been filed in the District Court of the United States for the District of Arizona, at Tucson, Arizona, on the 10th day of June, A. D. 1944, by F. E. Flynn, United States Attorney for the District of Arizona, on behalf of the United States against 7 Boxes Lemons, 307 lbs. gross; 2 Boxes Grapefruit, 92 lbs. gross; 10 Cases Canned Milk, 48 cans ea., 14½ oz. net weight each "Pet" and "Carnation" brands, and One Truck, 1940 Pickup, Motor No. T-105-2887, Plymouth Model PT105, SR. 9209823 for reasons and causes in said libel mentioned, and praying the usual process and monition of the said Court in that behalf to be made, and that all persons having or pretending to have any right, title or interest therein may be cited to appear and answer all and singular the matters in the said libel articulately propounded, and that this Court shall be pleased to propound, and that said property, hereinbefore particularly described, be proceeded against and attached and seized for condemnation, and for such other penalties as are mention in said libel.

You Are, Therefore, Commanded, to attach the said property and to detain the same in your custody until the further order of this Court respect-

ing the same, and to give notice of the time and place of said hearing, by giving the substance of such libel with the order of Court therein, setting forth the time and place for trial, to be inserted for one publication in some newspaper of general circulation, published at Nogales, in said District of Arizona. The said publication to be fourteen days prior to the date for hearing said libel, and to post notices thereof fourteen days prior to date of hearing, one at the west door on the south side of the United States Post Office and Court House in Tucson, and two thereof in two public places in the City of Tucson, Arizona, to all persons claiming the said property, or knowing or having anything to say why this Court should not proceed against the same, according to the prayer of said libel, and that they be and appear before said Court, to be holden in and for said District of Arizona, at the United States Court House, in the City of Tucson, in the said District of Arizona, on Monday, the 10th day of July, 1944, at the hour of 10:00 o'clock in the forenoon of that day, if that be a day of jurisdiction, and then and there to interpose a claim to the same, and to make their allegations in that behalf.

And of what you shall have done in the premises do you then and there make return, together with this writ.

Witness the Honorable Albert M. Sames, Judge of the said Court and the seal thereof, this 10th day of June, A. D. 1944.

EDWARD W. SCRUGGS,
Clerk District Court of the United States for the District of Arizona.

By JEAN E. MICHAEL,
Deputy Clerk.

United States of America,
District of Arizona—ss.

Marshal's Return

Civil-245-Tucson

I, B. J. McKinney, United States Marshal for the District of Arizona, hereby certify and return that I executed the within writ of Attachment and Monition by seizing on June 12, 1944, at Nogales, Arizona, 7 boxes Lemons, 307 Lbs. gross; 2 boxes grapefruit, 92 Lbs. gross; and 5 cases canned milk of 48 14½ Oz. cans each, three labeled, "Pet" and two labeled "Carnation" at the Customs Service storeroom; and at the same time and place I handed a copy of the within writ, with a copy of Libel attached, to Alfred J. Taylor, Deputy Collector of Customs; and on the same day I stored the aforementioned fruit at the Citizens Utilities Company, Nogales, Arizona, and the canned milk at the Santa Cruz County Sheriff's Office, Nogales, Arizona; and on the same day at the Post Office Service Station, Nogales, Arizona, I seized One 1940 Plymouth Pick-

up Truck, Motor No. T-105-2887, Model PT 105 Serial No. 9209823; and I stored said automobile at the place where seized; and on June 19, 1944, at Tucson, Arizona, I posted Notice of Hearing on bulletin boards in three public places, to wit: U. S. Court House, Pima County Court House, and Tucson City Hall; and on June 23, 1944, I caused said Notice to be published in the Nogales International, a weekly newspaper of general circulation published in Nogales, Arizona; and attached hereto and made a part hereof is the publisher's Affidavit of Publication.

Signed and dated this 13th day of July, 1944, at Tucson, Arizona.

B. J. McKINNEY,
United States Marshal

By HAROLD BROOKS ROGERS,
Deputy U. S. Marshal.

Marshal's constructive earnings	$4.12
Drayage expense	1.00
Publication expense	8.25

AFFIDAVIT OF PUBLICATION

State of Arizona,
County of Santa Cruz—ss.

Before me, J. Figueras, a Notary Public in and for the County of Santa Cruz, duly commissioned and sworn, on this day personally appeared Craig Pottinger, who being first duly sworn, deposes and says: That he is the Publisher of The Nogales In-

ternational, a paper published at Nogales, Santa Cruz County, State of Arizona, and that the annexed notice or advertisement was published in said newspaper one time the publication being on June 23, 1944.

CRAIG POTTINGER

Subscribed and sworn to before me, at Nogales, Arizona, this 8th day of July, 1944.

[Seal] J. FIGUERAS,
Notary Public

My Commission Expires 2/23/47.

LEGAL NOTICE

Notice of hearing. No. Civil-245-Tucson. In the District Court of the United States for the District of Arizona. United States of America, Libelant, vs. 7 Boxes Lemons, 307 lbs. gross; 2 Boxes Grapefruit, 92 lbs. gross; 10 Cases Canned Milk, 48 cans ea., 14½ oz. net weight each "Pet" and "Carnation" brands, and One Truck, 1940 Pickup, Motor No. T-105-2887, Plymouth Model PT105, Sr. 9209823, Respondents. Notice is hereby given that on the 10th day of June, A. D. 1944, F. E. Flynn, United States Attorney for the District of Arizona, filed in the above-entitled court an Information of Libel on behalf of the United States of America against the respondents named in the title hereof, which were then and there intended to be exported, in violation of 22 USC 401, into the Republic of Mexico from the Port of Nogales, Arizona by Miguel Morachis, and on the filing of said Informa-

tion of Libel the Court, on the 10th day of June, A. D. 1944, duly ordered the issuance of an Attachment and Monition against the above-named respondents, and the said described articles have by the United States Marshal been duly levied upon and seized by virtue of said monition and order of attachment, and which order of said Court fixed the 26th day of June, 1944, at the hour of 10:00 o'clock in the forenoon of said day as the day for hearing said petition and any and all persons who might appear in said cause, and which order of said Court directed that notice of hearing on said Information be given by one publication in a newspaper of general circulation and printed and published at Nogales, in said District of Arizona, the said publication to be fourteen days prior to the date for hearing said libel, and to post notice thereof fourteen days prior to the date of hearing, one at the west door on the south side of the United States Post Office and Court House in Tucson, and two thereof in the City of Tucson, Arizona. Now, Therefore, Notice Is Hereby Given that pursuant to an Order of the Court made and entered in the above-entitled Court in the above-entitled cause, the hearing on the Information of Libel in the above-entitled matter will be had before the Court at the Federal Courtroom in said Court in the City of Tucson, Arizona, on the 10th day of July, 1944, at the hour of 10:00 o'clock A. M. of said date, or upon any subsequent date of said Court to which the hearing may be continued, at which time all persons interested are notified to appear and show

cause, if any they have, why the prayer of said Information should not be allowed and why the Court should not pronounce against said articles hereinabove described and declare the same forfeited to the United States Government and delivered to the proper officers of the United States Government for the use and benefit of said Government as provided by law, and at which time any and all persons having any interest in and claim to said articles may present to said Court any and all such claims and any and all reasons that they may have why said articles should not be forfeited as prayed for in said Information. Dated this 10th day of June, 1944. B. J. McKinney, United States Marshal.

[Endorsed]: Filed July 13. 1944.

[Title of District Court and Cause.]

DESIGNATION AS TO SUPPLEMENTAL RECORD

It appearing that there have been omitted certain parts of the transcript of record of this action on appeal, and counsel having stipulated thereto, the Clerk of the above entitled court is hereby directed to certify to the Clerk of the Circuit Court of Appeals for the Ninth Circuit, the following additional portions of said record:

1. Minute Entry of June 7, 1944;

2. All docket entries of June 7, 1944;

3. Affidavit for Warrant of Detention of Seized Property, filed June 7, 1944;

4. Information of Libel, filed June 10, 1944;

5. Attachment and Monition with Marshal's return thereon, filed July 13, 1944;

6. This Designation.

JOHN P. DOUGHERTY,
Assistant U. S. Attorney, Attorney for Libelant-Appellant.

[Endorsed]: Filed Sept. 12, 1945.

[Title of District Court and Cause.]

CLERK'S CERTIFICATE TO SUPPLEMENTAL TRANSCRIPT OF RECORD

United States of America,
District of Arizona—ss.

I, Edward W. Scruggs, Clerk of the United States District Court for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said Court, including the records, papers and files in the case of United States of America, Libelant, versus 7 Boxes Lemons, et al, Respondents, numbered Civil-245-Tucson, on the docket of said Court.

I further certify that the attached pages, numbered 1 to 14, inclusive, contain a full, true and correct transcript of the proceedings of said cause and all the papers filed therein, together with the

endorsements of filing thereon, called for and designated in the Designation as To Supplemental Record filed in said cause and made a part of the supplemental transcript attached hereto, as the same appear from the originals of record and on file in my office as such Clerk, in the City of Tucson, State and District aforesaid.

I further certify that the Clerk's fee for preparing and certifying to this said supplemental transcript of record amounts to the sum of $6.15, and that a memorandum of said sum has been entered in said cause by me for services rendered on behalf of the United States.

Witness my hand and the Seal of the said Court this 12th day of September, 1945.

[Seal] EDWARD W. SCRUGGS,
Clerk

[Title of District Court and Cause.]

WARRANT FOR DETENTION OF SEIZED PROPERTY

Whereas, an Affidavit having been filed alleging that the above-named articles in the title hereof were seized by William H. Shane, Customs Inspector at Nogales, Arizona, and that said articles were being, and intended to be exported, shipped from and taken out of the United States of America and into the Republic of Mexico in violation of law, and without obtaining the necessary license to export the same, and

Whereas, a motion has been made by the United States District Attorney for the District of Arizona for the issuance of a warrant upon said Affidavit,

Now, Therefore, I, Albert M. Sames, Judge of the District Court of the United States for the District of Arizona, by this my warrant, authorize and empower that said articles above-described be detained by said seizing officer until the President of the United States orders the same to be restored to the owner or claimant, or until the same are discharged in due course of law on petition of the claimant or on trial of condemnation proceedings as provided in 22 USCA 401-408.

Given under my hand this 7th day of June, 1944.

(Signed) ALBERT M. SAMES
Judge, U. S. District Court
for The District of Arizona

I certify that this a true, exact, and correct copy of an original Warrant for Detention of Seized Property on file in the office of the Collector of Customs, Customs Collection District of Arizona, Nogales, Arizona.

ALFRED G. KIBBE,
Deputy Collector of Customs

Subscribed and sworn to before me by Alfred G. Kibbe at Nogales, Arizona, on September 25, 1945.

[Seal] H. R. CHATHAM,
Assistant Collector of Customs

[Endorsed: No. 11007. United States Circuit Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Miguel Morachis, Owner and Claimant of one Plymouth Truck, 1940 Pickup, Motor No. T-105-2887, Model PT 105, Sr. 9209823, Appellee. Supplemental Transcript of Record. Upon Appeal from the District Court of the United States for the District of Arizona.

Filed September 19, 1945.

PAUL P. O'BRIEN,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

No. 11007

In the United States Circuit Court of Appeals for the Ninth Circuit

UNITED STATES OF AMERICA, APPELLANT

v.

ONE PLYMOUTH TRUCK, 7 BOXES OF LEMONS 307 LBS. GROSS, 2 BOXES GRAPEFRUIT 92 LBS. GROSS, 10 CASES CANNED MILK, 48 CANS EACH, "PET" AND "CARNATION" BRANDS, RESPONDENTS-APPELLEES

MIGUEL MORACHIS, CLAIMANT-APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLANT

FRANK E. FLYNN,
United States Attorney, Tucson, Arizona,
JOHN P. DOUGHERTY,
Assistant U. S. Attorney,
ALLAN B. LUTZ,
Attorney, Department of Justice, Washington, D. C.,
Attorneys for United States, Appellant.

INDEX

664599—45——1

AUTHORITIES CITED

Cases:

In the United States Circuit Court of Appeals for the Ninth Circuit

No. 11007

UNITED STATES OF AMERICA, APPELLANT

v.

ONE PLYMOUTH TRUCK, 7 BOXES OF LEMONS 307 LBS. GROSS, 2 BOXES GRAPEFRUIT 92 LBS. GROSS, 10 CASES CANNED MILK, 48 CANS EACH, "PET" AND "CARNATION" BRANDS, RESPONDENTS-APPELLEES

MIGUEL MORACHIS, CLAIMANT-APPELLEE

UPON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF ARIZONA

BRIEF OF APPELLANT

JURISDICTION OF THE DISTRICT COURT

The District Court had jurisdiction of this proceeding under Section 24 (9) of the Judicial Code as amended (28 U. S. Code, Section 41 (9) as this is a suit or proceeding for the enforcement of forfeitures incurred under the laws of the United States (R. 2, 4, 10, 11, and 14). The laws of the United States involved are: Title VI of the Espionage Act of 1917, i. e., the Act of June 15, 1917, Chapter 30, 40 Stat.

223–225 as amended, 22 U. S. Code, Section 401–408 incl.; and the Export Control Law of 1940 as amended, i. e., Section 6 of the War Powers Act of July 2, 1940, Chapter 508 (54 Stat. 714), as amended by the Act of June 30, 1942, Chapter 461 (56 Stat. 463), as further amended by Act of July 1, 1944, Chapter 360, 58 Stat. 671; 50 App. U. S. C. § 701.

JURISDICTION OF THIS COURT

This is an appeal from a final decision in the District Court for the District of Arizona, and no direct review may be had in the Supreme Court under Section 238 of the Judicial Code (28 U. S. C. § 345). This Court therefore has jurisdiction of this appeal under Section 128 of the Judicial Code (28 U. S. C. § 225 (a)), as amended.

STATEMENT OF THE CASE

This case is a test case and is representative of a large number of similar cases, a few of which are in this circuit and many are in the Fifth Circuit. The question is directly presented for the first time to an appellate court for an authoritative determination.

This appeal is taken by the United States from the judgment of the United States District Court at Tucson, Arizona, entered on January 27, 1945, decreeing restoration of the Plymouth truck under seizure (by the Collector of Customs) and in the actual or constructive custody of the Court in a proceeding wherein appellant United States claimed forfeiture of the truck to the United States under Title VI of the Espionage Act, June 15, 1917, 40 Stat. 223–225 as amended (22 U. S. C. § 401–408).

The truck was seized by the United States Collector of Customs on June 3, 1944, at Nogales, Arizona, together with 7 boxes of lemons, 307 lbs. gross; 2 boxes grapefruit, 92 lbs. gross; and 10 cases of canned milk, 48 cans per case (R. 10, FF 1). The food and the truck were seized on the grounds that the food was about to be exported, shipped from, or taken out of the United States into Mexico in violation of law in that a license for such an exportation as required by the regulations of the Foreign Economic Administration (formerly Board of Economic Warfare[1]) under the Export Control Act of 1940, as amended (50 App. U. S. C. § 701), had not been issued (R. 10), and on the further grounds that the truck contained articles about to be exported, shipped from, or taken out in violation of law, and that the truck was intended to be used for said exportation (R. 10). Within ten days after the said seizure a warrant for further detention of the property seized including the food and the truck was applied for on oath filed in the United States District Court for Arizona (See Appendix A, p. 50 this brief) and granted by the Court. (R. 10. See Appendix A, p. 52 this brief.) A libel of forfeiture was filed (See Appendix A, p. 53 this brief) by the United States against the cases of canned milk, and boxes of lemons and grapefruit, and the Plym-

[1] Executive Order 9361, July 15, 1943 (8 F. R. 9861), issued by the President pursuant to the Act of December 18, 1941, ch. 593, 55 Stat. 838, 50 App. U. S. C. 601, transferred powers and functions of Board of Economic Warfare to Office of Economic Warfare, and by Executive Order 9380 (8 F. R. 13081), September 25, 1943, the powers and functions of the Office of Economic Warfare were in turn transferred to the Foreign Economic Administration.

outh truck on June 10, 1944 (R. 2, 12, 14). No petition for restoration of the milk, lemons and grapefruit pursuant to Section 3 of Title VI of the Espionage Act, 22 U. S. C. § 403 was filed by owner or claimant (R. 11). The District Court found as a conclusion of law that the boxes and cases of food were subject to forfeiture to the United States because they were "about to be exported from the United States into the Republic of Mexico in violation of the Export Control Act of 1940 as amended" (R. 14), and ordered them forfeited to the United States in the judgment (R. 3).

Timely Petition for Restoration of the automobile however was filed by Miguel Morachis in the District Court for the District of Arizona claiming that he was the owner of said Plymouth truck, that said truck was not intended to be exported from the United States to the Republic of Mexico and requesting that said truck be restored to him (R. 10, 11.) The District Court held as a conclusion of law that the Plymouth truck was not about to be exported, shipped from, or taken out of the United States into the Republic of Mexico in violation of law and that Title VI of the Espionage Act of 1917 does not authorize forfeiture of the vehicle containing articles about to be unlawfully exported but only authorizes seizure and detention of the vehicle so used (R. 14), and ordered in its judgment of January 27, 1945 that the petition of Miguel Morachis for restoration of said Plymouth truck be granted (R. 3). The Court did not purport to act under the bonding provisions of Section 5 (22 U. S. C. § 405).

On February 7, 1945 execution of the order of restoration was stayed by the District Court pending the result of this appeal (R. 7). Also on February 7, 1945 the District Court allowed the appeal herein (R. 6), petition for allowance of which was filed by the appellant (R. 5) since the statute here involved (Sec. 5) provides that the proceedings shall conform as near as may be to the proceedings in admiralty, 22 U. S. C. § 405.

Because it was not sure whether or not Rule I of the Rules in Admiralty of this Court was applicable to this appeal, appellant also filed a timely notice of appeal (R. 5). Assignments of error were filed on February 1, 1945 and citation on appeal was issued on February 8, 1945 and filed with acknowledgment of service by proctor for appellee on February 12, 1945 (R. 9). An agreed statement of facts was entered into by proctors for both parties (R. 9, 15) and filed on March 6, 1945 (R. 15). Said agreed statement was designated by both parties as embracing all the record necessary for the consideration of this appeal (R. 18 and 19).

QUESTION INVOLVED

The only question involved is whether Title VI of the Espionage Act of 1917, 22 U. S. C. § 401–408 incl., in conjunction with the Export Control Law of 1940 as amended, i. e., Title 6 of the Act of July 2, 1940, Chapter 508, as amended by Act of June 30, 1942, Chapter 461, 56 Stat. 463,[2] 50 App. U. S. C.

[2] As further amended by Act of July 1, 1944, Chapter 360, 58 Stat. 671.

§ 701 and the orders and regulations issued thereunder, authorizes forfeiture of a vehicle seized thereunder if the vehicle is used to take out or attempt to take out articles that cannot lawfully be exported because no license as required by said export control orders, regulations and laws had been issued for such exportation. If it does the judgment below should be reversed and the automobile under seizure should be forfeited to the United States.

SPECIFICATION OF ASSIGNED ERRORS

Appellant's five assignments of error in substance relate to one principle error—to wit: that the Court erred in concluding that the Plymouth truck was not subject to forfeiture to the United States under Title VI of the Espionage Act of 1917. For that reason the following five assignments of error which appear on page 4 of the Record will be treated as one in the argument herein:

1. The Court erred in ordering restoration of the respondent, one Plymouth Truck pick-up automobile, 1940 model, to petitioner, Morachis.

2. The Court erred in failing to hold the aforesaid 1940 pick-up truck for forfeiture to the United States.

3. The Court erred in failing to order forfeiture of the aforesaid 1940 pick-up Plymouth truck to the United States.

4. The Court erred in holding that Title VI of the Act of June 15, 1917, Chapter 30, 40 Stat. 223, as amended did not provide forfeiture of the vehicle containing the lemons, grapefruit and canned milk under

the circumstances revealed in the findings of fact herein.

5. The Court erred in finding that the aforesaid 1940 pick-up Plymouth truck was not being taken out of the United States in violation of law within the meaning of Title VI of the Act of June 15, 1917, Chapter 30, 40 Stat. 223 as amended (46 U. S. C. § 401–408 incl.).

STATEMENT OF THE FACTS

The agreed statement as it relates to the facts covers only four pages of the record (R. 10–13 incl.) but for the court's convenience the substance of the facts appearing therein will be here set forth:

On June 3, 1944, at the Port of Nogales, Arizona, the Collector of Customs seized 7 boxes of lemons 307 lbs. gross, 2 boxes grapefruit 92 lbs. gross and 10 cases of canned milk 48 cans each, and 1 Plymouth Truck for forfeiture under the Export Control Act of 1940 as amended (R. 10) upon the grounds hereinabove set forth. (Statement of Case, p. 3 this brief. See also R. 10.)

At the time of the seizure, claimant-appellee Morachis had an office in Nogales, Arizona, where he was in the business of buying and selling produce and shipping it into Mexico (R. 11, FF 5). On June 3, 1944 the employees of claimant-appellee Morachis who were conducting his business in his absence arrived at the Customs station at Nogales, Arizona, with the Plymouth truck here involved containing the aforesaid lemons, grapefruit and canned milk and presented

to the Customs Inspector an Export Declaration declaring for export 3 crates of celery, 2 boxes of sweetpotatoes, 20 boxes of fresh bread and 10 cases of apples (R. 11, FF 6). Upon examination of the contents of the truck, the Inspector found concealed beneath the bread in separate bread cartons, 10 cases of canned milk which had not been declared and also discovered that the boxes labeled "apples" actually contained lemons and grapefruit (R. 11, FF 7) which also had not been declared (R. 13, FF 18). No license for the exportation of said milk, grapefruit and lemons as required by the regulations of the Foreign Economic Administration had been obtained (R. 13, F 19). The agreed statement on this appeal also adopts the following facts as found by the District Court:

> 16. When the truck, canned milk, lemons and grapefruit were seized the truck was going from the United States into Mexico and the contents of the truck were being shipped into Mexico (R. 13).
>
> * * * * *
>
> 20. The aforesaid employees of Morachis, who were conducting his business with his consent in his absence, used the aforesaid Plymouth Truck with the intention of, and as a means of, exporting or taking out of the United States and into Mexico the aforesaid lemons, grapefruit, and canned milk without having declared said lemons, grapefruit, and canned milk (R. 13).
>
> * * * * *
>
> 14. The 1940 Plymouth Truck here proceeded against was used by Morachis and his

aforesaid employees at Nogales, Arizona, in their produce business (R. 13).

* * * * *

12. That said Plymouth Truck was used in this instance in an attempt to carry articles out of the United States without the required export license (R. 12).

* * * * *

8. That one of the employees arriving with the truck as aforesaid, one Rodolpho Tapia, shipping clerk and secretary of said Miguel Morachis, was in complete charge of the business of said Morachis. He was in charge of making purchases and the exportation back and forth. Morachis just checked the bills every month or so (R. 12).

9. That the said employees of Miguel Morachis were instructed by Rodolpho Tapia to attempt the smuggling and that said Tapia admitted that he had no license to export the said milk, grapefruit or lemons and had attempted to smuggle the produce across the border (R. 12).

10. That the said undeclared, concealed and falsely declared milk, grapefruit and lemons were, at the time of seizure, about to be exported from or taken out of the United States in violation of law and without a special license therefor having been issued by the Foreign Economic Administration (R. 12).

11. That the said Plymouth Truck, registered under the laws of Arizona, was in constant daily use between Nogales, Mexico, and Nogales, Arizona, for a period of about two years prior to the date of seizure, shipping produce from the United States into Mexico (R. 12).

The appellant asserts the Plymouth Truck is made subject to forfeiture by Title VI of the Espionage Act of 1917 as amended, 22 U. S. C. § 401–408 incl., since no license was obtained for the exportation of the canned milk, lemons and grapefruit as required by regulations and orders issued under the Export Control Act of 1940 as amended, 50 App. U. S. C. § 701. The Government, of course, does not question that portion of the judgment which forfeited to the United States the canned milk, lemons and grapefruit.

STATUTES AND REGULATIONS

Title VI, Espionage Act of 1917, act of June 15, 1917, chapter 30, 40 Stat. 223–225, as amended by the act of March 1, 1929, chapter 420, 45 Stat. 1423

SEIZURE OF ARMS AND OTHER ARTICLES INTENDED FOR EXPORT

SECTION 1. Whenever an attempt is made to export or ship from or take out of the United States any arms or munitions of war, or other articles, in violation of law, or whenever there shall be known or probable cause to believe that any such arms or munitions of war, or other articles, are being or are intended to be exported, or shipped from, or taken out of the United States, in violation of law, the several collectors, comptrollers of customs, surveyors, inspectors of customs, and marshals, and deputy marshals of the United States, and every other person duly authorized for the purpose by the President, may seize and detain any articles or munitions of war about to be exported or shipped from, or taken out of the United States, in violation of law, and the vessels or

vehicles containing the same, and retain possession thereof until released or disposed of as hereinafter directed. If upon due inquiry as hereinafter provided, the property seized shall appear to have been about to be so unlawfuly exported, shipped from, or taken out of the United States, the same shall be forfeited to the United States (40 Stat. 223–4; cf. Title 22, U. S. C. § 401).

SEC. 2. It shall be the duty of the person making any seizure under this title to apply, with due diligence, to the judge of the district court of the United States, or to the judge of the United States district court of the Canal Zone, or to the judge of a court of first instance in the Philippine Islands, having jurisdiction over the place within which the seizure is made, for a warrant to justify the further detention of the property so seized, which warrant shall be granted only on oath or affirmation showing that there is known or probable cause to believe that the property seized is being or is intended to be exported or shipped from or taken out of the United States in violation of law; and if the judge refuses to issue the warrant, or application therefor is not made by the person making the seizure within a reasonable time, not exceeding ten days after the seizure, the property shall forthwith be restored to the owner or person from whom seized. If the judge is satisfied that the seizure was justified under the provisions of this title, and issues his warrant accordingly, then the property shall be detained by the person seizing it until the President, who is hereby expressly authorized so to do, orders it to be restored to the owner or claimant, or until it is dis-

charged in due course of law on petition of the claimant, or on trial of condemnation proceedings, as hereinafter provided (40 Stat. 224; cf. Title 22, U. S. C. § 402).

SEC. 3. The owner or claimant of any property seized under this title may, at any time before condemnation proceedings have been instituted, as hereinafter provided, file his petition for its restoration in the district court of the United States, or the district court of the Canal Zone, or the court of first instance in the Philippine Islands, having jurisdiction over the place in which the seizure was made, whereupon the court shall advance the cause for hearing and determination with all possible dispatch, and, after causing notice to be given to the United States attorney for the district and to the person making the seizure, shall proceed to hear and decide whether the property seized shall be restored to the petitioner or forfeited to the United States (40 Stat. 224; cf. Title 22 U. S. C. § 403).

SEC. 4. Whenever the person making any seizure under this title (sections 238 to 245, inclusive, of chapter 5, title 22 United States Code) applies for and obtains a warrant for the detention of the property, and (a) upon the hearing and determination of the petition of the owner or claimant restoration is denied, or (b) the owner or claimant fails to file a petition for restoration within thirty days after the seizure, the United States attorney for the district wherein it was seized, upon direction of the Attorney General, shall institute libel proceedings in the United States district court or the district court of the Canal Zone or the

court of first instance of the Philippine Islands having jurisdiction over the place wherein the seizure was made against the property for condemnation; and if, after trial and hearing of the issues involved, the property is condemned, it shall be disposed of by sale, and the proceeds thereof, less the legal costs and charges, paid into the Treasury: *Provided,* That the court shall order any arms and munitions of war so condemned delivered to the War Department of the United States. (As amended by Act of March 1, 1929, Chapter 420, 45 Stat. 1423; cf. Title 22, U. S. C. § 404.)

SEC. 5. The proceedings in such summary trials upon the petition of the owner or claimant of the property seized, as well as in the libel cases herein provided for, shall conform, as near as may be, to the proceedings in admiralty, except that either party may demand trial by jury of any issue of fact joined in such libel cases, and all such proceedings shall be at the suit of and in the name of the United States: *Provided,* That upon the payment of the costs and legal expenses of both the summary trials and the libel proceedings herein provided for, and the execution and delivery of a good and sufficient bond in an amount double the value of the property seized, conditioned that it will not be exported or used or employed contrary to the provisions of this title, the court, in its discretion, may direct that it be delivered to the owners thereof or to the claimants thereof (40 Stat. 224–5; cf. 22 U. S. C. Sec. 405).

SEC. 6. Except in those cases in which the exportation of arms and munitions of war or other articles is forbidden by proclamation or otherwise by the Pres-

ident, as provided in section one of this title, nothing herein contained shall be construed to extend to, or interfere with any trade in such commodities, conducted with any foreign port or place wheresoever, or with any other trade which might have been lawfully carried on before the passage of this title, under the law of nations, or under the treaties or conventions entered into by the United States, or under the laws thereof (40 Stat. 225; cf. Title 22 U. S. C. § 406).

SEC. 7. Upon payment of the costs and legal expenses incurred in any such summary trial for possession or libel proceedings, the President is hereby authorized, in his discretion, to order the release and restoration to the owner or claimant, as the case may be, of any property seized or condemned under the provisions of this title (40 Stat. 225; cf. Title 22, U. S. C. § 407).

SEC. 8. The President may employ such part of the land or naval forces of the United States as he may deem necessary to carry out the purposes of this title (40 Stat. 225, cf. 22 U. S. C. § 408).

Export control law of 1940, section 6 of War Powers Act of July 2, 1940, chapter 508 (54 Stat. 714), as amended by act of June 30, 1942, ch. 461; (56 Stat. 463), as further amended by act of July 1, 1944, chapter 360, 58 Stat. 671, 50 App. U. S. C. § 701

SEC. 6 (a). The President is hereby authorized to prohibit or curtail the exportation of any articles, technical data, materials, or supplies, except under such rules and regulations as he shall prescribe.

(b) Unless the President shall otherwise direct, the functions and duties of the President under this sec-

tion shall be performed by the Foreign Economic Administration.

(c) In case of the violation of any provision of any proclamation, rule, or regulation issued hereunder, such violator or violators, upon conviction, shall be punished by a fine of not more than $10,000, or by imprisonment for not more than two years, or by both such fine and imprisonment.

(d) The authority granted by this section shall terminate on June 30, 1945, or upon any prior date which the Congress by concurrent resolution, or the President, may designate; except that as to offenses committed, or rights or liabilities incurred prior to such date, the provisions of this section and such rules, regulations, and proclamations shall be treated as remaining in effect for the purpose of sustaining any suit, action, or prosecution with respect to such right, liability, or offense (Title 50, App. U. S. C. § 701).

Revised export control regulations of the Board of Economic Warfare, Vol. 8, Fed. Register, p. 1494, as amended by Amendment 143 (Foreign Economic Administration), effective on January 29, 1944, Vol. 9, Fed. Register, pp. 833, 834.

§ 801.2. *Prohibited Exportations.*—The exportation from the United States of all the commodities hereafter enumerated in this section and all technical data as defined in § 806.1 of this subchapter to all destinations except Canada (including that part of Labrador under Canadian authority) is hereby prohibited unless and until a license authorizing such exportation shall have been issued by the Office of Exports:

(Fruits—canned, dried, and fresh are included, pp. 1513, 1514; milk and cream, condensed, evaporated, dried and fresh are specifically included under "Dairy products" p. 1509; "General License Group—None" for all these commodities is provided in Amendment 143. Vol. 9, Fed. Register, pp. 833, 834.)

ARGUMENT

Point I

The statute clearly authorizes seizure of the vehicle containing articles about to be exported in violation of law

The forfeiture to the United States is claimed herein under Title VI of the Espionage Act of 1917 approved June 15, 1917 as amended, 22 U. S. C. § 401–408 incl. The purpose of that Title was to provide effective civil punishment for illegal traffic in the exportation of arms, munitions of war and other articles or produce deemed necessary by the President to our wartime or domestic economy. Consonant with similar enforcement statutes the statute provided for seizure of the vehicle being used in the unlawful exportation.

Section 1 of Title VI of the Espionage Act of 1917 (22 U. S. C. § 401) provides in part as follows:

> Whenever an attempt is made to export * * * or take out of the United States any arms or munitions of war, *or other articles,* in violation of law * * * (40 Stat. 223, 22 U. S. C. § 401). [Italics by counsel.] See full text pp. 10–11, this brief.)

Clearly the described contingency existed in this case in view of the admittedly unlicensed character of the food products which it was attempted to export.

Said section after stating the above condition and adding an alternative condition where only "probable cause" exists provides that the Collectors, inspectors of customs, etc.

> may seize and detain any articles * * * about to be exported * * * from * * * the United States, in violation of law, *and the* * * * *vehicles containing the same,* * * * (40 Stat. 224, 22 U. S. C. § 401). [Italics by counsel.]

This statutory provision leaves it unquestioned that the seizure in this case was authorized and justified in view of the agreed statement of facts indicating that the boxes and cases of food were about to be exported in violation of law.

Section 1 then provides that the seizing authorities may "retain possession thereof until released or disposed of as hereinafter directed, * * *." This clause providing for retention or possession "thereof" clearly applies to both the vehicles and the articles seized and hence not only is the seizure of the truck here involved clearly within the statute but its retention in the possession of the seizing officer is clearly provided for.

Point II

When read together the several provisions of the act show that Congress intended that a vehicle taken out of the country in violation of law, i. e., transporting, exporting, or taking out articles illegally, shall be forfeited to the United States

The agreed statement of fact states that there was an admitted attempt to "smuggle the produce across

the border" (R. 12, FF 9); that the Plymouth truck was used in this instance in an attempt to carry articles out of the United States without the required export license (R. 12, FF 12); that the truck was used with the intention of, and as a means of, exporting or taking out of the United States and into Mexico the food here involved without declaring same and without a license for same (R. 13, FF 20, 16, 18, 19); and that at the time of the seizure the milk, grapefruit, and lemons were about to be exported from or taken out of the United States in violation of law, and without a license having been issued (R. 12, FF 10).

As stated in Point I of this brief, Section 1 of Title VI of the Espionage Act (22 U. S. C. § 401) provides clearly for seizure of the vehicle containing such articles or produce and for its retention until released or disposal of "as hereinafter directed." Immediately thereafter the same section provides:

> If upon due inquiry as hereinafter provided, the property seized shall appear to have been about to be so unlawfully exported, shipped from, or taken out the United States, the same shall be forfeited to the United States (40 Stat. 224, 22 U. S. C., § 401).

Here for the first time the word *property* is used. In the previous clauses which must be closely scrutinized there are three groups of things or property dealt with: (1) arms or munitions of war, (2) other articles, and (3) vessels or vehicles containing the same.

For convenience in analysis we reprint here the provisions of Section 1 (40 Stat. 223–4, 22 U. S. C., § 401):

> SECTION 1. Whenever an attempt is made to export or ship from or take out of the United States, *any arms or munitions of war,* or *other articles,* in violation of law, or whenever there shall be known or probable cause to believe that any such *arms or munitions of war, or other articles,* are being or are intended to be exported, or shipped from, or taken out of the United States, in violation of law, the several collectors, naval officers, surveyors, inspectors of customs, and marshals, and deputy marshals of the United States, and every other person duly authorized for the purpose by the President, may seize and detain *any articles or munitions* of war about to be exported or shipped from, or taken out of the United States, in violation of law, *and the vessels or vehicles containing the same,* and retain possession thereof until released or disposed of as hereinafter directed. If upon due inquiry as hereinafter provided, *the property seized* shall appear to have been about to be so unlawfully exported, shipped from, or taken out of the United States, the same shall be forfeited to the United Sates (40 Stat. 223–4, 22 U. S. C. § 401). [Italics by counsel.]

The use of the words "the property seized" in the last sentence is significant when compared with the language previously used. In the first part of the section setting forth the conditions under which seizure may be had, reference is made to "arms or

munitions of war" on the one hand and "other articles" on the other hand. In the middle clause defining what may be seized and detained, reference is made to "any articles" and to "munitions of war" and to "vehicles or vessels containing the same." But in the last sentence of the section providing for substantive forfeiture the all inclusive words "the property seized" is used for the first time. Thus the vehicles seized as well as the articles seized are to be forfeited.

Section 2 (40 Stat. 224, 22 U. S. C. § 402) makes it the duty of the seizing officer to apply for a warrant for further detention. This clearly applies to the vehicle as well as to the property. For convenience in scrutiny the section is here reproduced in full:

> SEC. 2. It shall be the duty of the person making *any seizure* under this title to apply, with due diligence, to the judge of the district court of the United States, or to the judge of the United States district court of the Canal Zone, or to the judge of a court of first instance in the Philippine Islands, having jurisdiction over the place within which the seizure is made, for a warrant to justify the further detention *of the property so seized,* which warrant shall be granted only on oath or affirmation showing that there is known or probable cause to believe that *the property seized* is being or is intended to be exported or shipped from or taken out of the United States in violation of law; and if the judge refuses to issue the warrant, or application therefor is not made by the person making the seizure within a reasonable time, not exceeding ten days after the seizure, the

> property shall forthwith be restored to the owner or person from whom seized. If the judge is satisfied that *the seizure* was justified under the provisions of this title and issues his warrant accordingly, then *the property* shall be detained by the person seizing *it* until the President, who is hereby expressly authorized so to do, orders *it* to be restored to the owner or claimant, or until *it* is discharged in due course of law on petition of the claimant, or on trial of condemnation proceedings, as hereinafter provided (40 Stat. 224, 22 U. S. C. § 402). [Italics by counsel.]

Here again the section clearly refers to "any seizure" and the Judge if satisfied that "the seizure" was justified and issues his warrant accordingly, "then *the property* shall be detained." If return of the vehicle were intended, here there should have been a provision for it. But instead further detention is authorized if the seizure was justified. Point I of this brief demonstrates that seizure of the vehicle was justified.

Section 3 (40 Stat. 224, 22 U. S. C. § 403) provides in part as follows:

> The owner or claimant of *any property seized* * * * may at any time before condemnation proceedings have been instituted, * * * file his petition for its restoration * * * whereupon the Court * * * shall proceed to hear and decide whether *the property seized* shall be restored to the petitioner *or forfeited to the United States* (40 Stat. 224, 22 U. S. C. § 403). [Italics by counsel.]

Thus the provisions of both Section 2 and 3 envisage the continued possession in the seizing officer of all or any of the three classes of *things* or *property* referred to in the various clauses of Section 1, i. e.; (1) arms or munitions of war, (2) other articles, and (3) the vehicles containing same, up until after condemnation proceedings are commenced or until the hearing on petition for restoration.

Section 3 provides for a summary hearing on the question of whether *the property seized* shall be forfeited or restored. No substantive test as to whether or not the vehicle or the commodities shall be forfeited appears in either Section 2 or 3, nor is there any indication of the time when such vehicle is to be restored. But it is reasonable to suppose that if Section 2 and 3 did not contemplate that the vehicles were to be continued in the possession of the seizing officer and in the constructive custody of the Court the words "the property seized" would not be continued to be used but reference rather would be made to "arms or munitions of war or other articles" as is done in the first clauses of Section 1 and also in Section 6. This would seem to follow from the sole use in Section 1 of the words "the property seized" to refer to all three classes of *things* or *property* mentioned in Section 1.

Section 4 (45 Stat. 1423–4, 22 U. S. C. § 404) provides in part as follows:

> Whenever the person making *any seizure* under this title * * * obtains a warrant for the detention of *the property* * * * the United States attorney * * * for the dis-

> trict *wherein it was* seized, * * * shall institute libel proceedings in the United States District Court * * * wherein the seizure was made, *against the property* for condemnation; and if after the trial or hearing of the issues involved, *the property* is condemned, it shall be disposed of by sale, * * * (45 Stat. 1423–4, 22 U. S. C. § 404). [Italics by counsel.]

Section 4 continues to refer to "the property" and "any seizure," and indicates that libels of forfeiture *and decrees of condemnation against the vehicle* containing the arms, munitions or other articles are envisaged by the Act.

Analysis of section 5 (40 Stat. 224–5, 22 U. S. C. § 405) reveals a similar result:

> The proceedings in such summary trials upon the petition of the owner or claimant of *the property seized,* as well as in the libel case herein provided for, shall conform, * * * to the proceedings in admiralty, * * * *Provided,* That upon the payment of the costs and legal expenses of both the summary trials and the libel proceedings herein provided for, and the execution and delivery of a good and sufficient bond in an amount double the value of *the property seized,* conditioned that it will not be exported *or used or employed* contrary to the provisions of this title, the court, in its discretion, may direct that *it* be delivered to the owners thereof or to the claimants thereof (40 Stat. 224–5, 22 U. S. C. § 405). [Italics by counsel.]

Here again the use of the all inclusive words "the property seized" instead of "arms and munitions or

other articles" is significant. It clearly indicates that up until, during and after either a summary trial (on petition for restoration of the claimant) or the plenary trial (in libel proceedings) the vehicle containing the arms or munitions or other articles still are expected to be in the possession of the seizing officer and in the constructive possession of the court.

Furthermore this section indicates that the vehicle is included in the bonding procedure by the use of the words "conditioned that it will not be exported or used or employed contrary to the provisions of this title." The use of the words "or used or employed" appear to refer to the vehicle's transporting the commodities, because the other provisions of title VI do not purport to make illegal *the use or employment* of arms or munitions or other articles in any way, but specifically make illegal *their exportation.* The ordinary and obvious meaning of the words "used or employed" in this situation would be applicable only to the vehicle used in the exportation.

It should be noted that the proviso begins by setting up the condition that the costs and expenses of the summary trial and the libel proceedings must be paid before the bonding will release "the property seized." Here again the use of this language indicates that it was envisaged that the vehicles might still be under seizure and detention during and after both types of trials or hearings have been had and that such trials might result in condemnation of the vehicle as well as the arms, munitions or other articles. Otherwise there would be no necessity for its release upon bond nor for the condition that it not

be used or employed contrary to the provisions of the title.

Here again we find the provision that upon bonding in the Court's discretion "it," which refers back to "the property seized," be delivered to the owner or claimant. (The lower court did not purport to release the Plymouth truck under bond pursuant to Sec. 5.)

The vehicle containing the forbidden munitions or articles also appears to be included within the scope of Section 7 (40 Stat. 225; 22 U. S. C. § 407) which provides in part as follows:

> Upon payment of the costs and legal expenses incurred in any such summary trial for possession or libel proceedings, the President, is hereby authorized, * * * to order * * * restoration * * * of *any property seized or condemned* under the provisions of this title. (40 Stat. 225; 22 U. S. C. § 407 [Italics by counsel)]

Here again the use of the words "any property seized" would seem to include the vehicle seized. Otherwise the section could have employed the phrase as did Section 1 and 6: "arms and munitions of war or other articles." Also the first clause by providing: "Upon payment of the costs and legal expenses incurred in any such summary trial for possession or libel proceedings" indicates that it was envisaged that there might be a trial and libel proceedings involving the vehicles as included in "any property seized."

That the words "the property" was not being used in these sections as synonymous with "arms, muni-

tions of war or other articles" is demonstrated by the language of Section 6 (See text pp. 13–14 this brief.) Section 6 (40 Stat. 225, 22 U. S. C. § 406) significantly reverts to the use of the words "arms and munitions of war" on the one hand and "or other articles" on the other hand and does not use the word "property."

We therefore conclude that in the last sentence in Section 1, 22 U. S. C. § 401 the words "the property seized" was purposely used to include the vehicle and that it was intended that the vehicle containing the forbidden arms or articles together with the arms and munitions of war or other articles should be forfeited to the United States.

None of the above provisions sets a time or defines the circumstances under which the vehicle seized while containing forbidden exports shall be restored by the Court unconditionally to the owner, although as Point I of this brief demonstrates, their seizure is clearly provided by statute.

Section 2 (22 U. S. C. § 402) authorizes restoration of the property by the President. It provides that if the judge is—

> satisfied that the seizure was justified * * * *the property* shall be detained by the person seizing it until the President, who is hereby expressly authorized so to do, orders it to be restored to the owner or claimant, or until it is discharged in due course of law upon petition of the claimant, or upon trial of condemnation proceedings as hereinafter provided. [Italics by counsel.] (40 Stat. 224; 22 U. S. C. § 402.)

Restoration by the President on certain conditions *in his discretion* is specifically provided by Sec. 7:

> Upon payment of the costs and legal expenses incurred in any such summary trial * * * the President is hereby authorized *in his discretion,* to order the release and restoration to the owner or claimant as the case may be of any property seized or condemned under the provisions of this title." [Italics by counsel.] (See text p. 21 this brief, 40 Stat. 225; 22 U. S. C. § 407.)

Here is an appropriate provision and here appear the circumstances under which the return of such vehicle is authorized. The language is logically applicable to the circumstances. But as emphasized above the language here envisages the fact that the vehicle would still be in the possession of the Court during and after the summary trial and libel proceedings.

Restoration *by the Court* of the vehicle containing illegal exports appears to be specifically authorized *under the conditions* set forth in Section 5 (quoted just above p. 23 this brief.)

Section 5 (40 Stat. 224; 22 U. S. C. § 405) provides that the proceedings shall conform as near as may be to the proceedings in admiralty, and then adds the proviso that the property seized may be delivered to the owners or claimants, upon execution of a bond in an amount double the value of *the property seized* "conditioned that it will not be exported or used or employed contrary to the provisions of this title * * *."

Here is the only provision, outside of Section 7 and the clause in Section 2, expressly authorizing the President to order restoration of the property seized, setting forth the time and circumstances under which the vessel which is being used to transport illegal exports may be restored by the Court to the owner, i. e., the court in its discretion may in proper circumstances order the release of the property seized on bond. This provision would seem appropriate as applied to the vehicle especially in view of the language of the statutory condition to be contained in the bond, namely "that it will not be exported, or used, or employed contrary to the provisions of this title." But the Court did not purport to release on bond.

Thus not only is no time or set of circumstances set forth in the statute specifically for return of the vehicle containing the illegal merchandise, but the language of the various sections indicate such vehicle is to be held and forfeited together with the merchandise, where the latter is subject to forfeiture.

Point III

There would be no necessity or useful purpose in providing for seizure and detention of the vehicle, which provision is clearly contained in the sections 1 and 2 of the title here involved, were forfeiture of the vehicle not also contemplated

A. Seizure and search authorized anyway

It is well established that it is the duty of investigative or prosecuting officers to seize any property connected with the crime and preserve it for use at the trial. The Court in *United States of America* v. *21*

lbs. 8 oz. Platinum, 147 Fed. (2) 78 (C. C. A. 4) stated as follows:

> * * * it was their duty as prosecuting officers to seize any property connected with the crime and preserve it for use at the trial (p. 82).

In *Agnello* v. *United States,* 269 U. S. 20, the U. S. Supreme Court stated at page 30 as follows:

> The right without a search warrant contemporaneously to search persons lawfully arrested while committing crime and to search the place where the arrest is made in order to find *and seize things connected with the crime as its fruits or as the means by which it was committed,* as well as weapons and other things to effect an escape from custody, is not to be doubted. See *Carroll* v. *United States,* 267 U. S. 132, 158; *Weeks* v. *United States,* 232 U. S. 383, 392. [Italics by counsel.] (p. 30)

Any violation of the Export Control Law of 1940 is a crime. 50 App. U. S. C. 701 (c). See text page 15, this brief.

In *Carroll* v. *U. S.,* 267 U. S. 132, the Court at p. 153 said:

> Having thus established that contraband goods concealed and illegally transported in an automobile or other vehicle may be searched for without a warrant, we come now to consider under what circumstances such search may be made. It would be intolerable and unreasonable if a prohibition agent were authorized to stop every automobile on the chance of finding liquor and thus subject all persons lawfully

> using the highways to the inconvenience and indignity of such a search. *Travellers may be so stopped in crossing an international boundary because of national self protection reasonably requiring one entering the country to identify himself as entitled to come in, and his belongings as effects which may be lawfully brought in* (pp. 153–4). [Italics by counsel.]

Once the merchandise such as the canned milk, lemons and grapefruit here involved is seized and taken into the custody of the collector of customs there would be no point in providing further detention of the automobile if the whole act envisaged the restoration of the automobile to the claimant.

B. Further detention useless if no forfeiture of vehicle envisaged

In fact, in fairness to the owner-claimant, *if the vehicle were not subject to forfeiture,* the vehicle should not be subject to detention beyond the time required to remove from the vehicle the prohibited articles. Hence all the elaborate machinery for the obtaining of a warrant for further detention, the petition for restoration, the filing of a libel, the filing of an answer to the libel, the summary and plenary trials, the filing of a petition addressed to the President, which as demonstrated in Point II above are applicable to the vehicle as well as to the arms and munitions of war or other articles, would be meaningless and vain proceedings, were the ultimate event to be that the vehicle should be restored to the claimant.

It is to be presumed that Congress would not provide for a vain and useless thing. A contention for an interpretation of other language in the same sec-

tion which also would call for seizure and detention plus restoration of property seized was repudiated by the Circuit Court of Appeals for the 4th Circuit in the case of *United States* v. *21 lbs. 8 ozs. more or less of Platinum,* 147 Fed. (2) 78, as follows:

> We think that a literal interpretation of the statute is not permissible, for it leads to a result that Congress could not have intended. Under a literal interpretation a warrant for detention could never be issued and a condemnation of forfeiture could never be decreed. The statute contemplates first a seizure under § 401 and next, an application for a warrant of detention under § 402. Where a seizure has taken place, the goods are safely in the custody of a government agent and the possibility of an illegal exportation is at an end; so that it cannot be said that the property is then being exported or intended to be exported in violation of law, and it would be impossible to accompany the application for a warrant of detention with an affidavit showing an intention at the time to export the goods.
>
> Furthermore, a forfeiture could not be had under a literal construction because the issuance of the warrant is the first step to be taken in a proceeding for condemnation, and § 402 says that if the judge refuses the warrant, the property shall be forthwith restored to the owner (p. 83).

Thus we conclude forfeiture of the vehicle containing the forbidden merchandise was intended, as otherwise the statutory provision for seizure, detention, and retention in custody would be unnecessary and would serve no useful purpose.

Point IV

The judicial, executive, and legislative branches of the Government have treated the statute since its passage in 1917 as including forfeiture of the vehicles containing the articles whose exportation is unlawful

A. Judicial

The question here involved has never been authoritatively discussed by an appellate court. However there have been a number of judicial inferences that the vehicles containing the commodities whose exportation was forbidden are subject to forfeiture under the statute on that ground alone.

In *United States* v. *251 Ladies' Dresses and One 1941 Ford Truck,* 53 F. Supp. 772 (District Court S. D. Texas, Brownsville Div., August 6, 1943), the Court ordered forfeiture of the truck under seizure on the sole grounds that it was "being used in the transportation of said merchandise from Laredo to El Fronton Ranch at the time of seizure" (p. 772). It was stipulated that later the goods were to be smuggled into Mexico without a license. No discussion appears in the opinion on the specific point but apparently all parties assumed that the truck was subject to forfeiture and that the truck, together with the ladies' dresses, were forfeited, the Court's opinion concluding as follows:

> From what has been said, it follows that the two hundred and fifty-one (251) Ladies' Rayon "Synthetic" Dresses and the truck in which same were being transported should have been seized and should now be forfeited in this suit to the United States of America (pp. 774–775).

In *United States* v. *267 Twenty Dollar Gold Pieces,* 255 F. 217 (District Court, W. D. Wash., January 23, 1919) in considering *separate* libels for forfeiture under the Espionage Act against one McLaughlin automobile and 267 Twenty Dollar Gold Pieces based on the same set of facts, the Court and counsel made no point at all that the automobile was not subject to forfeiture under the Act, though this question was squarely before the Court since a separate libel was filed against the automobile. The allegation against the automobile in support of its forfeiture was that *by the use of said automobile claimant* "did wilfully and feloniously attempt to export out of the United States at the port of Blaine, Washington, into the Province of British Colombia, gold pieces, coin of the United States, without having first made application to a Federal Reserve Bank in violation of the Espionage Act" (p. 218). Exceptions filed on other grounds were sustained.

See also forfeiture decree (App. C. p. 63 this brief) entered Jan. 27, 1919 in District Court for Arizona in *United States* v. *One Vim Auto-Truck* (unreported). This case was not called to the attention of the District Court.

In addition during the last four years decrees of forfeiture have been entered by various district courts against automobiles on the sole ground that they were being used in carrying out of the country commodities the exportation of which was unlawful. The following list will identify 17 such specific cases in various district courts which are unreported and wherein decrees of forfeiture of the automobile or truck containing illegal exports have been entered where the

violations were similar to that involved in this case. This is not an exhaustive list.

1. *United States* v. *11 Robbins Automobile Tire Tubes, One Cadillac Sedan, et al.* Civil No. 547. Southern District of California. May 7, 1945.
2. *United States* v. *One 10 Ply Goodrich Silvertown Tire, One 1936 Ford Sedan, etc.* Civil No. 250, Tucson. District of Arizona. November 6, 1944.
3. *United States* v. *10 Cases of Arsenate of Lead and One Chevrolet Truck.* Civil No. 204. Western District of Texas, El Paso Division. December 5, 1942.
4. *United States* v. *One Chevrolet Sedan and 65 Used Rubber Tires.* Civil No. 328. Southern District of Texas, Brownsville Division. May 19, 1945.
5. *United States* v. *One Diamond "T" Truck and One Lot of Ammunition.* Civil No. 305. Southern District of Texas, Brownsville Division. May 19, 1945.
6. *United States* v. *One 1936 Dodge Sedan and 7 Used Tires.* Civil No. 310. Southern District of Texas, Brownsville Division. May 19, 1945.
7. *United States* v. *One Lot of Ammunition and One Chevrolet Sedan.* Civil No. 304. Southern District of Texas, Brownsville Division. May 19, 1945.
8. *United States* v. *One Truck and One Lot of Miscellaneous Merchandise.* Civil No. 314. Southern District of Texas, Brownsville Division. May 19, 1945.

9. *United States* v. *One Hundred Gross Buttons and One Pontiac Coupe Automobile.* Civil No. 20. Western District of Texas, Del Rio Division. November 30, 1943.
10. *United States* v. *One Lot of Automobile Parts and One 1936 Ford Coupe.* Civil No. 147. Southern District of Texas, Laredo Division, March 4, 1944.
11. *United States* v. *One Lot of Automobile Parts and One 1930 Ford Roadster.* Civil No. 146. Southern District of Texas, Laredo Division. March 4, 1944.
12. *United States* v. *One Ford Coupe Automobile and One Lot of Automobile Parts.* Civil No. 130. Southern District of Texas, Laredo Division. April 13, 1944.
13. *United States* v. *One Chevrolet Pick-up Truck and Certain Electrical Equipment and Wearing Apparel.* Civil No. 135. Southern District of Texas, Laredo Division. March 4, 1944.
14. *United States* v. *One Plymouth Automobile and Fourteen Rolls Copper-Coated Steel Tubing.* Civil No. 124. Southern District of Texas, Laredo Division. June 9, 1944.
15. *United States* v. *One Plymouth Sedan.* Civil No. 343. Western District of Texas, El Paso Division, June 19, 1944.
16. *United States* v. *18 gallons of Flavored Syrup and One 1935 Ford Truck.* Civil No. 213. Southern District of Texas, Brownsville Division. June 18, 1943.
17. *United States* v. *One Case of Lard, 32 pieces of Silverware and One Chevrolet Truck.* Civil

No. 205. Western District of Texas, El Paso Division. December 5, 1942.

Here are a number of judicial indications that the automobile carrying the illegal exports is to be forfeited.

B. Administrative

A long standing administrative interpretation supports the interpretation that the vehicle is subject to forfeiture. This administrative interpretation is evidenced by the fact already referred to above that in 1919 libel of forfeiture was filed against the automobile carrying the illegal export in the case just discussed, *United States* v. *267 Twenty Dollar Gold Pieces,* 255 F. 217 (District Court, W. D. Wash., January 23, 1919). The court there was considering a libel for forfeiture under the Espionage Act against one McLaughlin automobile and also a libel for forfeiture of 267 Twenty Dollar Gold Piece. As already has been pointed out the only allegation asserted against the automobile in support of its forfeiture was that *by the use of said automobile* claimant "did wilfully and feloniously attempt to export * * * gold pieces, etc." (Opinion, p. 218.) See also decree of forfeiture against the automobile entered Jan. 27, 1919 in District Court for Arizona, *U. S.* v. *One Vim Auto-Truck,* p. 63 this brief, App. C.

Since the statute provides that the libel proceedings shall be instituted "upon direction of the Attorney General," 45 Stat. 1423–4, 22 U. S. C. § 404, the cases just referred to are direct evidence of the fact that the administrative interpretation of the

statute in the years shortly after its passage in 1917 was that the vehicle was subject to ferfeiture.

Also the administrative interpretation is directly evidenced by the opinion in *United States* v. *251 Ladies Dresses and One 1941 Ford Truck,* 53 F. Supp. 772 (S. D. Texas, Brownsville Div., Aug. 6, 1943) discussed above where the truck under seizure was "being used in the transportation of said merchandise from Laredo to El Fronton Ranch at the time of seizure" (p. 773). Here again the libel presumably was filed in accordance with the statutory requirement "upon direction of the Attorney General." 22 U. S. C. § 404. Incidentally it was the Attorney General who drafted the Espionage Act of 1917 and had the President submit it to Congress (see vols. 54 and 55, Congressional Record).

Again after the Export Control Law of 1940 became the occasion of numerous forfeitures incurred under Title VI of the Espionage Act it is clear that the executive interpretation of the Espionage Act was that the vehicle containing the unlawful commodities was subject to forfeiture proceedings, as is evidenced by the large number of forfeiture libels and decrees against automobiles containing illegal commodities which have been filed in the last four years under Title VI of the Espionage Act of 1917, as listed above under subpoint A, this point (pp. 33–36 incl.). These libels also were not to be filed except "upon direction of the Attorney General."

Such long standing administrative interpretation is evidence of the proper interpretation of the statute.

The Supreme Court of the United States stated the rule as follows in *Edward's Lessee* v. *Darby,* 25 U. S. (12 Wheaton) 206:

> In the construction of a doubtful and ambiguous law, the contemporaneous construction of those who were called upon to act under the law, and were appointed to carry its provisions into effect, is entitled to very great respect (p. 210).

The rule as stated by Sutherland on Statutory Construction (3rd Ed.—Horack) is as follows:

> Long-continued contemporaneous and practical interpretation of a statute by the executive officers charged with its administration and enforcement, the courts, and the public constitutes an invaluable aid in determining the meaning of a doubtful statute" (Section 5103, Vol. 2, p. 512).

See also *United States* v. *Hill,* 120 U. S. 169.

C. Legislative

Congress passed two statutes popularly known as the Neutrality Act of 1935, and the Neutrality Act of 1937, in each of which it apparently assumed that the vehicle was subject to forfeiture by reason of Title VI of the Espionage Act of 1917. The arms and vehicles containing them were made subject to Title VI of the Espionage Act, and the language used implies that forfeiture of the vehicle by reason of Title VI was assumed by Congress.

The 1935 Act, Senate Joint Resolution No. 173, approved August 31, 1935, Chapter 837, 49 Stat. 1081, full text of Section 1 of which is set forth in Appendix B, p. 58 this brief, provided in part as follows:

> Whoever, in violation of any of the provisions of this section, shall export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from the United States, or any of its possessions, shall be fined not more than $10,000 or imprisoned not more than five years, or both, and the property, vessel, or vehicle containing the same shall be subject to the provisions of section 1 to 8 inclusive, title 6, chapter 30 of the Act approved June 15, 1917 (40 Stat. 223–225; U. S. C., Title 22, secs. 238–245).
>
> *In the case of the forfeiture of any arms, ammunition, or implements of war by reason of a violation of this Act,* no public or private sale shall be required; but such arms, ammunition, or implements of war shall be delivered to the Secretary of War for such use or disposal thereof as shall be approved by the President of the United States (49 Stat. 1081).[3] [Italics by counsel.]

Analysis of the language used indicates that the Congress when it passed this Act believed that the vessels or vehicles containing the prohibited commodities are subject to forfeiture under the 1917 Act. The second paragraph by the use of the words "in the case of" indicates two categories of forfeiture under the previous paragraph:

1. Of arms, ammunition or implements of war, and
2. The vessel or vehicle containing the same.

It provides in the case of forfeiture of the first category for delivery to the War Department. Since this

[3] Repealed by House Joint Res. 306, approved Nov. 4, 1939, chapter 2, Section 19, 54 Stat. 12.

particular statute covers only arms, ammunition or implements of war, the second paragraph need only have read "*any property* (or article) forfeited by reason of a violation of this Act shall be delivered to the Secretary of War" unless it envisaged forfeiture also of the vehicle containing the forbidden exports by the provision that they shall be subject to Title VI of the Espionage Act of 1917.

Similarly the Act of 1937, Senate Joint Resolution 51, approved May 1, 1937, Chapter 146, 50 Stat. 121, full text of section 1 of which appears in Appendix B, p. 60 this brief, provides in part as follows:

> (e) Whoever, in violation of any of the provisions of this Act shall export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from the United States shall be fined not more than $10,000, or imprisoned not more than five years or both, and the property, vessel, or vehicle containing the same shall be subject to the provisions of sections 1 to 8, inclusive, title 6, chapter 30, of the Act approved June 15, 1917 (40 Stat. 223–225; U. S. C. 1934 ed., title 22 secs. 238–245).
>
> (f) *In the case of the forfeiture of any arms, ammunition, or implements of war by reason of a violation of this Act,* no public or private sale shall be required; but such arms, ammunition, or implements of war shall be delivered to the Secretary of War for such use or disposal thereof as shall be approved by the President

of the United States (50 Stat. 122[4]). [Italics by counsel.]

Here again Congress indicated its belief that forfeiture of the vehicle containing the forbidden articles is provided under Title VI of the Espionage Act by specifying in subsection (f) that "In the case of the forfeiture of any arms, ammunition or implements of war by reason of a violation of this act, * * * such arms, ammunitions or implements of war shall be delivered * * *." This language seems clearly to imply other forfeitures were available under the Neutrality Act by reason of their being made subject to Title VI of the Espionage Act of 1917. Such other forfeitures under the language of this Neutrality Act could only be the vehicle containing the arms, etc. And as to such vehicle, subsection (e) *supra* provides only that it "shall be subject to Sections 1 to 8, inclusive, Title 6," Espionage Act of 1917.

As has been demonstrated in Point III of this brief there would be no point in providing that the vehicles should be subject to Title VI of the Espionage Act if the only purpose was to authorize their seizure and detention, as such provision would be unnecessary and serve no useful purpose.

It thus appears that ever since the passage of the Act of 1917 the executive, legislative, and judicial branches have assumed that the automobile containing

[4] Repealed by House Joint Res. 306, approved Nov. 4, 1939, Chapter 2, Section 19, 54 Stat. 12.

the articles, as well as the forbidden articles, is subject to forfeiture.

Point V

This is a remedial statute. It was drafted during our neutrality crisis and passed in wartime to be applicable to wartime violations, as well as to other emergency situations such as neutrality crises. Rule of strict construction inapplicable

The rule of strict construction does not require affirmance of the lower court's judgment.

The Espionage Act became law on June 15, 1917. Title VI of the Act was reported to the 64th Congress as Senate No. 6811, Feb. 8, 1917 (54 Cong. Rec. 2819). The Act declaring war with Germany was approved April 6, 1917 (40 Stat. 1).

A. Strict construction not required

This court stated in *United States* v. *Monstad, et al.*, 134 F. 2d 986:

> Strictness of construction should not defeat the real objective of the statute (p. 988).

In that case the question was whether or not a penalty provision was applicable to fishing and gambling barges anchored off the California coast within the meaning of the statute forbidding the navigating of seagoing barges without a certificate of inspection from the Government steamboat inspectors.

In discussing the very section of the Espionage Act now under consideration, the 4th C. C. A. in the case of *United States* v. *21 lbs. 8 ozs. Platinum*, 147 F. (2d) 78 declined to apply the rule of strict interpretation (at p. 83) in the following language:

We think that a literal interpretation of the statute is not permissible, for it leads to a result that Congress could not have intended. Under a literal interpretation a warrant for detention could never be issued and a condemnation of forfeiture could never be decreed.

* * * * *

Furthermore, a forfeiture could not be had under a literal construction because the issuance of the warrant is the first step to be taken in a proceeding for condemnation, and § 402 says that if the judge refuses the warrant, the property shall be forthwith restored to the owner.

We must look therefore for a more reasonable interpretation, * * *

* * * * *

There is no legal difficulty in giving this meaning to the statute for it is established that a thing may be within the letter of the statute and yet not within the statute because not within the spirit or legislative intent. "The reason of the law in such cases should prevail over its letter". *Holy Trinity Church* v. *United States,* 143 U. S. 457; *State of Maine* v. *United States,* D. C. Me., 45 F. Supp. 35, aff., 134 F. 2d 574; *United States* v. *Monstad,* 9 Cir., 134 F. 2d 986.

Moreover, it is well established that "statutes to prevent frauds upon the revenue are considered as enacted for the public good and to suppress a public wrong, and, therefore, although they impose penalties or forfeitures, not to be construed, like penal laws generally, strictly in favor of the defendant; but they are

> to be fairly and reasonably construed so as to carry out the intention of the legislature." *United States* v. *Stowell,* 133 U. S. 1, 12. See also, *Johnson* v. *Southern Pacific Co.,* 196 U. S. 1, 17; *United States* v. *A. Graf Distilling Co.,* 208 U. S. 199, 205–6; *United States* v. *Ryan,* 284 U. S. 167, 172. For like reasons, the Espionage Act of June 15, 1917, which was enacted for equally important public purposes, should be construed in a fair and reasonable manner (pp. 83–84).

B. National Defense and Wartime Legislation

In any case, where legislation is enacted for expedition of the national defense, the rule of strict construction of penal or forfeiture statutes should fall beneath the compelling necessities of a nation preparing for, or actually at, war. Sutherland on Statutory Construction (3rd Edition—Horack—1943), Section 7216, pp. 446–7 states:

> It is imperative that legislation providing for national defense and the prosecution of war shall be liberally construed to accomplish its important objectives.
>
> * * * * *
>
> In time of war criminal statutes pertaining to national defense and the unimpaired conduct of the war should not be given the strict construction which is ordinarily applied to penal statutes; and it has not been uncommon for the courts to recognize that a statute may have a different meaning in time of war than it does have in time of peace.

It has also been held that statutes for the prevention of fraud, for the suppression of a probable wrong, or to effect a public good are not in a strict sense penal, although they impose a penalty. *Taylor* v. *United States,* 44 U. S. (3 Howard) 197, 210. In that case the Court's language is revealing:

> The judge was therefore strictly accurate, when he stated that "It must not be understood that every law which imposes a penalty is, therefore, legally speaking, a penal law, that is, a law which is to be construed with great strictness in favor of the defendant. Laws enacted for the prevention of fraud, for the suppression of a public wrong, or to effect a public good, are not, in the strict sense, penal acts, although they may inflict a penalty for violating them." And he added, "It is in this light I view the revenue laws, and I would construe them so as most effectually to accomplish the intention of the legislature in passing them." The same distinction will be found recognized in the elementary writers, as, for example, in Blackstone's Commentaries (1 Black. Comm., 88), and Bacon's Abridgment (statute I 7, 8), and Comyns' Digest (Parliament R. 13, R. 19, R. 20), and it is also abundantly supported by the authorities (p. 210–211).

C. The policy and spirit of the law indicates the vehicle should be subject to forfeiture

The legislative history of the Espionage Act of 1917 in the 64th and 65th Congresses, shows that Congress

intended to fortify the Government with strong economic as well as political weapons in time of war and emergencies such as the neutrality crisis preceding our entry into the war. While there is no clear expression in the debates and reports as to the precise point here involved, the policy in enforcement statutes of forfeiting vehicles or vessels used for the commission of illegal acts is well established. There are cogent reasons for the application of the same policy where vital war or defense materials may make their way out of this country and possibly into unfriendly hands, or where our political policy of neutrality or aid to a belligerent might be indirectly compromised by such forbidden exports.

The reasons why forfeiture of the vehicle carrying the illegal commodity is recognized to be an important enforcement adjunct in statutes involving importation, exportation and transportation are several. The real culprits involved are hard to catch. They work through "fences," so that the real operators are not present at the time of the seizure. Frequently they are not resident in the United States and hence cannot be apprehended nor investigated readily. The vehicle used always appears to belong to someone other than those actually caught in the act. Frequently the commodities seized at the time of the discovery are not of large value although they constitute only one portion of a continuing scheme of exportation or importation in small quantities. The subterfuge appearing in the instant case is a typical example. Some of the food was in bread cartons covered up with bread and

some was labeled "apples" and was so declared. Actually it consisted of canned milk, grapefruit and lemons, the exportation of which was unlawful. It can well be imagined that many similar attempt by this or other groups are likely to be successful because undiscovered. The relatively large amount of smuggling which is attempted at the Mexican border might well be considered a matter of judicial notice. It is illustrated by the large number of cases similar to the one here involved which have arisen in the Texas districts. (See list of only a fraction pp. 33–36 this brief.) An example of the type of operation engaged in on the Mexican border is set forth in detail in the opinion in the *United States* v. *251 Ladies Dresses,* 53 Fed Supp. 772, an excerpt of which is set out below in footnote.[5]

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[5] "It is agreed that at the time that Claimant Fortunato Ramirez purchased said dresses in Laredo, they were intended to be exported to Mexico.

"It is agreed that at the time the dresses were seized by the officers, the same were being transported from Laredo, in Webb County, Texas, to El Fronton Ranch, in Starr County, where the claimant resides, and the goods were to be taken to his home, to be stored, to be later taken from said El Fronton Ranch to Monterrey, Mexico, and that the goods were seized at or about one o'clock p. m. on a road leading from the highway from Roma to Laredo to the El Fronton Ranch and a short distance from the claimant's home.

"It is agreed that claimant Rafael Ramirez is the owner of the truck sought to be forfeited and that such truck was being used in the transportation of said merchandise from Laredo to El Fronton Ranch at the time of seizure.

"The foregoing stipulation is hereby entered into by and between the attorneys of record for the United States of America

Other typical examples of violations encountered on the Mexican border are set forth in the same volume in the consolidated cases of the *United States* v. *8 automobiles, United States* v. *2 automobiles,* and *United States* v. *4 automobiles,* 53 Fed. Supp. 775, and in *United States* v. *7 cartons of wearing apparel,* 53 Fed. Supp. 777.

Under these circumstances forfeiture of the goods which are seized at the time of discovery is frequently ineffectual to punish those really responsible. Frequently they either cannot be apprehended or proof of their complicity is difficult. We conclude therefore the policy of forfeiture of the vehicles containing the illegal merchandise is neither unnecessary or unreasonable and that Congress properly intended such forfeiture.

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and for the claimants in said Civil Action, and that such stipulation may be filed in said action in the trial of this cause by either party.

"In addition, the evidence shows:

"(b) That there was an understanding or agreement between Rafael Ramirez, the owner of the truck, and Fortunato Ramirez, the owner of the dresses, that the dresses would be transported from Laredo, Texas, to the home of Fortunato Ramirez or Rafael Ramirez, or other suitable place, in Texas, but near the border (Rio Grande) between the United States and Mexico, and then smuggled into Mexico, i. e., taken out of the United States without declaring same and without a license or other permit and in violation of the Laws and Executive Regulations of the United States.

"Also it was shown that at the time the dresses were seized, they were in such truck and Fortunato Ramirez and Rafael Ramirez were then and there attempting to carry out, and in the act of carrying out, such arrangement and agreement." *United States* v. *251 Ladies Dresses*, 53 Fed. Supp. 772–3.

CONCLUSION

The District Court erred in holding that Title VI of the Espionage Act of 1917 does not authorize forfeiture of a vehicle containing articles about to be unlawfully exported and in ordering restoration of the Plymouth truck under seizure herein to claimant; and the court's judgment restoring the vehicle to claimant should be reversed with appropriate provisions for its forfeiture to the United States.

FRANK E. FLYNN,
United States Attorney,
JOHN P. DOUGHERTY,
Assistant United States Attorney.
ALLAN B. LUTZ,
Attorney, Department of Justice.
Proctors for the United States.

APPENDIX A

APPLICATION FOR WARRANT FOR FURTHER DETENTION

In the District Court of the United States for the District of Arizona

No. Civil—245—Tucson

UNITED STATES OF AMERICA, LIBELANT

v.

7 BOXES LEMONS, 307 LBS. GROSS, 2 BOXES GRAPEFRUIT, 92 LBS. GROSS, 10 CASES CANNED MILK, 48 CANS EA., 14½ OZ. NET WEIGHT EACH, "PET" AND "CARNATION" BRANDS, AND ONE TRUCK, 1940 PICK-UP, MOTOR NO. T–105–2887, PLYMOUTH MODEL PT105, SR. 9209823, RESPONDENTS

AFFIDAVIT FOR WARRANT OF DETENTION OF SEIZED PROPERTY

[FILED JUNE 7, 1944]

UNITED STATES OF AMERICA,
District of Arizona:

William H. Shane, being first duly sworn, deposes and says: That he is a Customs Inspector stationed at Nogales, Arizona; that he was so engaged on June 3, 1944; that since that day he has been on duty in such official capacity at Nogales, Arizona; that on June 3, 1944, Roberto Sanchez Cuevas and Alfredo

Grijalva, truck drivers for Miguel Morachis of Nogales, Arizona, arrived at the Customs Inspection Station and presented two export declarations to support the exportation of three crates, 210 pounds, celery, two boxes, 70 pounds, sweet potatoes, twenty boxes, 540 pounds bread, and ten boxes, 480 pounds, of apples. A license from the Board of Economic Warfare was required for the apples, which they presented. Upon examination of the load of merchandise Inspector William H. Shane found that the boxes labeled apples contained grapefruit and lemons; further examination of the load disclosed that five of the twenty boxes labeled bread, contained canned milk, Carnation and Pet Brands. The truck drivers admitted that it was a deliberate attempt to smuggle the merchandise and that they had been so instructed by their immediate superior, Rudolfo Tapia Montano, shipping clerk and secretary for Miguel Morachis. Rudolfo Tapia Montano stated that they had endeavored to smuggle the fruit and canned milk because they had no license to export same; that on June 3, 1944, the truck, grapefruit, lemons, and the canned milk were seized, detained, and remain in the custody of the Collector of Customs, United States Customs District No. 26, Nogales, Arizona, because said merchandise was being exported in said truck in violation of the Export Control Regulations and as provided in Section 401, Title 22, U. S. C. A., pursuant to order of the Foreign Economic Administration, dated Jan-

uary 10, 1944, issued under the act of July 2, 1940, as amended June 30, 1942, 50 U. S. C. 701.

W. H. SHANE.

Subscribed and sworn to before me this 6th day of June 1944.

E. K. CUMMING.

[Seal of
E. K. CUMMING,
United States
Commissioner,
District of Arizona]

WARRANT FOR FURTHER DETENTION

In the District Court of the United States for the District of Arizona

No. Civil–245–Tucson

UNITED STATES OF AMERICA, LIBELANT

v.

7 BOXES LEMONS, 307 LBS. GROSS; 2 BOXES GRAPEFRUIT, 92 LBS. GROSS; 10 CASES CANNED MILK, 48 CANS EA., 14½ OZ. NET WEIGHT EACH, "PET" AND "CARNATION" BRANDS; AND ONE TRUCK, 1940 PICK-UP, MOTOR NO. T–105–2887, PLYMOUTH MODEL PT105, SR. 9209823, RESPONDENTS

WARRANT FOR DETENTION OF SEIZED PROPERTY

Whereas, an Affidavit having been filed alleging that the above-named articles in the title hereof were seized by William H. Shane, Customs Inspector at Nogales, Arizona, and that said articles were being, and intended to be exported, shipped from and taken out of the United States of America and into the Re-

public of Mexico in violation of law, and without obtaining the necessary license to export the same, and

Whereas, a motion has been made by the United States District Attorney for the District of Arizona for the issuance of a warrant upon said Affidavit,

Now, therefore, I Albert M. Sames, Judge of the District Court of the United States for the District of Arizona, by this my warrant, authorize and empower that said articles above-described be detained by said seizing officer until the President of the United States orders the same to be restored to the owner or claimant, or until the same are discharged in due course of law on petition of the claimant or on trial of condemnation proceedings as provided in 22 USCA 401–408.

Given under my hand this 7th day of June 1944.

Albert M. Sames,
Judge, U. S. District Court for the District of Arizona.

LIBEL

In the District Court of the United States for the District of Arizona

No. Civil–245–Tucson

United States of America, libelant

v.

Seven Boxes Lemons, 307 Lbs. Gross; 2 Boxes Grapefruit, 92 Lbs. Gross; 10 Cases Canned Milk, 48 Cans Ea., 14½ Oz. Net Weight Each "Pet" and "Carnation" Brands, and One Truck, 1940 Pickup, Motor No. T–105–2887, Plymouth Model PT105, Sr. 9209823, respondents

INFORMATION OF LIBEL

(For the forfeiture and condemnation of goods sought to be exported in viol. 50 U. S. C. 701, U. S. A. a party, Federal question.)

(Filed 6–10–44)

To the Honorable ALBERT M. SAMES, *Judge of the said court:*

Now comes the United States of America by Assistant United States Attorney John P. Dougherty, its attorney, and alleges on information and belief as follows:

I

That on or about the 3rd day of June 1944, at the Port of Nogales, Arizona, 7 boxes Lemons, 307 lbs. gross; 2 boxes Grapefruit, 92 lbs. gross; 10 cases Canned Milk, 48 cans ea., 14½ oz. net weight each "Pet" and "Carnation" brands, and One Truck, 1940 Pickup, Motor No. T–105–2887, Plymouth Model PT105, Sr. 9209823, were attempted to be exported or shipped from, or taken out of the United States of America in violation of law, and with the intention that said articles be exported, or shipped from, or taken out of the United States of America, in violation of law.

II

That the said articles were not manifested, and no export license for the said articles was presented to the Collector of Customs.

III

The exportation of said articles are prohibited by the provisions of 50 U. S. C. 701, and Proclamations, Executive Orders and Regulations issued pursuant to said statute and supplements and amendments thereto.

IV

No export license had been issued for the exportation of said articles although licenses for the exportation of the same are required by the aforesaid Statutes, Proclamations, Executive Orders and Regulations.

V

That on or about the 3rd day of June 1944, the Collector of Customs at Nogales, Arizona, pursuant to the authority of 22 U. S. C. 238 and 402, seized and detained the said articles and retained and still retains possession thereof for further disposition as may be provided by law.

VI

That thereafter, with due diligence and on or about the 7th day of June 1944, said Collector of Customs applied to the Honorable Judge of the United States District Court for the District of Arizona, under 22 U. S. C. 239 and 402, for a warrant to justify the further detention of such property; and on the 7th day of June, 1944, the said Judge, having been satisfied that the seizure was justified, issued his warrant accordingly, pursuant to the authority of 22 U. S. C. 239 and 402, and the said property has since been detained by said Collector for disposition according to law.

VII

That more than thirty days have passed since the seizure of said articles, and no owner or claimant has filed a petition for restoration of the whole or any part thereof.

VIII

That the Attorney General of the United States has directed the United States Attorney for this District to institute a libel proceeding in this Court against said articles, to forfeit and condemn said articles to the United States of America, pursuant to 22 USCA 241 and 404.

IX

That by reason of the premises and the same being contrary to the form of the statute or statutes of the United States in such cases provided, and the Proclamations, Executive Orders and Regulations issued by authority of law, the said articles became and are forfeited to the United States of America.

Wherefore, libelant prays that process in due form of law be issued to enforce said forfeiture and condemnation against the aforesaid articles citing all persons having or claiming any interest in the said articles to appear upon the return day and show cause why the condemnation and forfeiture should not be decreed; and that the aforesaid articles be condemned and forfeited to the United States of America and be ordered disposed of as provided by

law and that the libelant have such other and further relief in the premises as the Court shall deem just.

F. E. FLYNN
United States Attorney,
JOHN P. DOUGHERTY,
Assistant U. S. Attorney,
Attorney for Libellant,
412 Federal Building, Tucson, Arizona.

UNITED STATES OF AMERICA,
District of Arizona, ss:

John P. Dougherty, being first duly sworn, deposes and says that he is an Assistant United States Attorney for the District of Arizona; that he has read the foregoing libel of information and knows the contents thereof, and that he believes the same to be true in substance and in fact.

JOHN P. DOUGHERTY.

Subscribed and sworn to before me this 10th day of June 1944.

JEAN E. MICHAEL,
Deputy Clerk, U. S. District Court
for the District of Arizona.

APPENDIX B

NEUTRALITY ACT OF 1935—EXCERPT

On the 31st day of August 1935 there was approved Senate Joint Resolution No. 173, Chapter 837, 74th Congress, 1st Session, 49 Stat. 1081, providing for the prohibition of the export of arms, ammunition, and implements of war to belligerent countries, etc. Section 1 of that resolution provided in part as follows:

[Chapter 837]

JOINT RESOLUTION

Providing for the prohibition of the export of arms, ammunition, and implements of war to belligerent countries; the prohibition of the transportation of arms, ammunition, and implements of war by vessels of the United States for the use of belligerent states; for the registration and licensing of persons engaged in the business of manufacturing, exporting, or importing arms, ammunition, or implements of war; and restricting travel by American citizens on belligerent ships during war.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That upon the outbreak or during the progress of war between, or among, two or more foreign states, the President shall proclaim such fact, and it shall thereafter be unlawful to export arms, ammunition, or implements of war from any place in the

United States, or possessions of the United States to any port of such belligerent states, or to any neutral port for transshipment to, or for the use of, a belligerent country.

The President, by proclamation, shall definitely enumerate the arms, ammunition, or implements of war, the export of which is prohibited by this Act.

The President may, from time to time, by proclamation, extend such embargo upon the export of arms, ammunition, or implements of war to other states as and when they may become involved in such war.

Whoever, in violation of any of the provisions of this section, shall export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from the United States, or any of its possessions, shall be fined not more than $10,000 or imprisoned not more than five years, or both, and the property, vessel, or vehicle containing the same shall be subject to the provisions of sections 1 to 8 inclusive, title 6, chapter 30, of the Act approved June 15, 1917 (40 Stat. 223–225; U. S. C., title 22, secs. 238–245).

In the case of the forfeiture of any arms, ammunition, or implements of war by reason of a violation of this Act, no public or private sale shall be required; but such arms, ammunition, or implements of war shall be delivered to the Secretary of War for such use or disposal thereof as shall be approved by the President of the United States.

When in the judgment of the President the conditions which have caused him to issue his proclamation have ceased to exist he shall revoke the same and the provisions hereof shall thereupon cease to apply.

Except with respect to prosecutions committed or forfeitures incurred prior to March 1, 1936, this section and all proclamations issued

thereunder shall not be effective after February 29, 1936.

* * * * *

(49 Stat. 1081—repealed by Act of Nov. 4, 1939, Chapter 2, Section 9, 54 Stat. 12.)

NEUTRALITY ACT OF 1937—EXCERPT

On May 1, 1937, there was approved Senate Joint Resolution 146, 75th Congress, 1st Session, Chapter 146, 50 Stat. 121, which provided in part as follows:

[Chapter 146]

JOINT RESOLUTION

To amend the joint resolution entitled "Joint resolution providing for the prohibition of the export of arms, ammunition, and implements of war to belligerent countries; the prohibition of the transportation of arms, ammunition, and implements of war by vessels of the United State for the use of belligerent states; for the registration and licensing of persons engaged in the business of manufacturing, exporting, or importing arms, ammunition, or implements of war; and restricting travel by American citizens on belligerent ships during war", approved August 31, 1935, as amended.

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That the joint resolution entitled "Joint resolution providing for the prohibition of the export of arms, ammunition, and implements of war to belligerent countries; the prohibition of the transportation of arms, ammunition, and implements of war by vessels of the United States for the use of belligerent states; for the registration and licensing of persons engaged in the business of manufacturing,

exporting, or importing arms, ammunition, or implements of war; and restricting travel by American citizens on belligerent ships during war", approved August 31, 1935, as amended, is amended to read as follows:

"EXPORT OF ARMS, AMMUNITION, AND IMPLEMENTS OF WAR

"SECTION 1. (a) Whenever the President shall find that there exists a state of war between, or among, two or more foreign states, the President shall proclaim such fact, and it shall thereafter be unlawful to export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from any place in the United States to any belligerent state named in such proclamation, or to any neutral state for transshipment to, or for the use of, any such belligerent state.

"(b) The President shall, from time to time, by proclamation, extend such embargo upon the export of arms, ammunition, or implements of war to other states as and when they may become involved in such war.

"(c) Whenever the President shall find that a state of civil strife exists in a foreign state and that such civil strife is of a magnitude or is being conducted under such conditions that the export of arms, ammunition, or implements of war from the United States to such foreign state would threaten or endanger the peace of the United States, the President shall proclaim such fact, and it shall thereafter be unlawful to export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from any place in the United States to such foreign state, or to any neutral state for transshipment to, or for the use of, such foreign state.

"(d) The President shall from time to time by proclamation, definitely enumerate the arms,

ammunition, and implements of war, the export of which is prohibited by this section. The arms, ammunition, and implements of war so enumerated shall include those enumerated in the President's proclamation Numbered 2163, of April 10, 1936, but shall not include raw materials or any other articles or materials not of the same general character as those enumerated in the said proclamation, and in the Convention for the Supervision of the International Trade in Arms and Ammunition and in Implements of War, signed at Geneva June 17, 1925.

"(e) Whoever, in violation of any of the provisions of this Act shall export, or attempt to export, or cause to be exported, arms, ammunition, or implements of war from the United States shall be fined not more than $10,000, or imprisoned not more than five years or both, and the property, vessel, or vehicle containing the same shall be subject to the provisions of sections 1 to 8, inclusive, title 6, chapter 30, of the Act approved June 15, 1917 (40 Stat. 223–225; U. S. C. 1934 ed., title 22, secs. 238–245).

"(f) In the case of the forfeiture of any arms, ammunition, or implements of war by reason of a violation of this Act, no public or private sale shall be required; but such arms, ammunition, or implements of war shall be delivered to the Secretary of War for such use or disposal thereof as shall be approved by the President of the United States.

"(g) Whenever, in the judgment of the President, the conditions which have caused him to issue any proclamation under the authority of this section shall thereupon cease to apply with respect to the state or states named in such proclamation, except with respect to offenses committed, or forfeitures incurred, prior to such revocation."

(50 Stat. 121—repealed by Act of Nov. 4, 1939, Chapter 2, Section 9, 54 Stat. 12.)

APPENDIX C

In the District Court of the United States for the District of Arizona

Decree: Case No. T–145

UNITED STATES OF AMERICA

v.

ONE VIM AUTO-TRUCK, BEARING ARIZONA 1918 LICENSE NO. 13919

On this day here again comes C. R. McFall, Assistant United States Attorney for the said United States, and also comes A. A. Worsley, Esquire, Attorney for the claimant of the above mentioned property; and it appearing to the Court that a motion for decree upon the pleadings has been heretofore filed in this case on behalf of the United States and same has been set for hearing on this day; and the Court having considered the said motion of the said United States Attorney, for the said United States, for decree upon pleadings filed herein, and having heard arguments of both said Assistant United States Attorney and A. A. Worsley, Esquire, attorney for claimants herein, and being now fully advised concerning the same, allows the same, and orders that a decree of forfeiture be entered in this case, as prayed for in the Information filed herein.

It is, therefore, ordered, adjudged and decreed that the property heretofore seized by the Collector of Customs for the District of Arizona, as described in

said information, to-wit, One Vim auto-truck, bearing Arizona license No. 13919, be and the same is hereby condemned and forfeited to the United States for the reason and causes set forth in said Information, and the said property is hereby adjudged and decreed to be the property of the United States of America.

And it is further ordered, adjudged and decreed that said property be sold by the United States Marshal for the District of Arizona at public auction to the highest bidder for cash, at some suitable public place in the City of Nogales, in said District, to be selected by said Marshal and that said Marshal give notice of such sale as is provided by law and that place of sale, together with the day and hour thereof, to be particularly specified in said notice.

And it is further ordered, adjudged and decreed that said Marshal do pay over the proceeds of said sale, after deducting such costs and expenses as may be authorized by law, to the Clerk of this Court.

And it is further ordered, adjudged and decreed that all proper process do issue out of and under the seal of this Court by the Clerk of this Court, directed to said Marshal, commanding him to make sale of said property and disposition of the proceeds thereof, as herein adjudged.

Done in open court this 27th day of January 1919.

WM. H. SAWTELLE,
United States District Judge.

Endorsed:
Filed Jan. 27, 1919.
MOSE DRACHMAN, *Clerk.*

Copy

In the District Court of the United States for the District of Arizona

UNITED STATES OF AMERICA

v.

ONE VIM AUTO-TRUCK, BEARING ARIZONA 1918 LICENSE No. 13919

WARRANT FOR DETENTION OF PROPERTY SEIZED FOR VIOLATION OF ACT OF JUNE 15, 1917, AND ACT OF MARCH 3, 1893

Upon the Petition of George B. Mason, Special Deputy Collector of Customs for the Port of Nogales, District of Arizona, duly verified and heretofore filed in this matter, and being satisfied that the seizure made as set out in said Petition was and is justified under the provisions of Title 6 of the Act of Congress approved June 15, 1917, and entitled, "An Act To punish acts of interference with the foreign relations, the neutrality, and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes;"

IT IS HEREBY ORDERED, That the property so seized and described in said Petition, to-wit, One Vim Auto-truck, bearing Arizona 1918 license number 13919, shall be detained by the person making such seizure, as set out in said Petition, to-wit, George B. Mason, Special Deputy Collector of Customs for the Port of Nogales, Arizona, until the President of the United States orders said property to be restored to the owner or claimant thereof, or until it is discharged in due course of law, or is otherwise disposed of on

trial of condemnation proceedings, if the same shall hereafter be brought.

Dated at Tucson, Arizona, this 4th day of April A. D. 1918.

Judge, District Court of the United States for the District of Arizona.

In the District Court of the United States for the District of Arizona

UNITED STATES OF AMERICA

v.

ONE VIM AUTO-TRUCK, BEARING ARIZONA 1918 LICENSE No. 13919

PETITION

To the Honorable WILLIAM H. SAWTELLE, *Judge of the District Court of the United States for the District of Arizona:*

Comes now your Petitioner, Geo. B. Mason, Special Deputy Collector of Customs for the Port of Douglas, District of Arizona, and respectfully shows to Your Honor, as follows:

That on the 27th day of March A. D. 1918, at the Port of Nogales, in the District of Arizona, your Petitioner did seize and take into possession the following described property, to-wit: One Vim Auto-truck, bearing Arizona 1918 license number 13919;

That your Petitioner has probable cause to believe that the above described property, seized as aforesaid, contained certain merchandise, to-wit, four hundred eighty cans of milk, which said merchandise was being exported and shipped from, and taken out, and

intended to be exported and shipped from and taken out of the United States, to and into the Republic of Mexico, in violation of law, that is to say:

That on the 27th day of March A. D. 1918, said merchandise, to-wit, four hundred eighty cans of milk, was being exported and shipped from and taken out, and was intended to be exported and shipped from and taken out of the United States, through the said Port of Nogales, into the Republic of Mexico, without license or permit from the War Trade Board, in violation of the Act of Congress approved June 15, 1917, and the Proclamation of the President of the United States dated February 14, 1917, promulgated under and by authority of said Act;

That the said merchandise was contained and transported in and by the said property so seized, to-wit, One Vim Auto-Truck, bearing Arizona 1918 license number 13919, and the the said Auto-Truck was, on the aforesaid date, used by one Alberto Martinez, or some other person, as a vehicle to contain and transport, and export and ship from and take out, and to attempt to export and ship from and take out of the United States, through the said Port of Nogales, to and into the Republic of Mexico, the aforesaid merchandise, without license or permission so to do from the War Trade Board, in violation of the aforesaid Act of Congress and the said Proclamation of the President promulgated under and by authority thereof.

And your Petitioner further states that the said merchandise, to-wit, the said four hundred eighty cans of milk, so contained and transported in and by the said auto-truck, was being transported, shipped from and taken out of the United States, to and into the Republic of Mexico, through the said Port of Nogales, Arizona, by the aforesaid Alberto Martinez,

without the said Alberto Martinez delivering to the customs officer at said Port of Nogales, Arizona, a manifest thereof, as required by the Act of March 3, 1893.

Wherefore, your Petitioner prays that the said property, to-wit—One Vim Auto-Truck, bearing Arizona 1918 License number 13919, so seized as aforesaid, may be detained by your Petitioner until the President of the United States orders it to be restored to the owner or claimant thereof, or until it is discharged in due course of law, or otherwise disposed of on trial of condemnation proceedings, if the same shall hereafter be brought, and for such other order as may be necessary and proper in the premises.

Dated at Tucson, Arizona, this 3d day of April A. D. 1918.

GEO. B. MASON,
Petitioner.

UNITED STATES OF AMERICA,
District of Arizona, ss.

George B. Mason, Special Deputy Collector of Customs for the Port of Nogales, District of Arizona, being first duly sworn, says that he has read the above Petition and knows the contents thereof, and that the same is true, according to the best of his knowledge and belief.

[SEAL] GEO. B. MASON.

Subscribed and sworn to before me this 3rd day of April A. D. 1918.

EFFIE D. BOTTS,
Deputy Clerk, U. S. District Court.

Endorsed:

Law. No. 133 Tucson

In the District Court of the United States for the ------ of Arizona

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v.

One Vim-Auto-Truck

Petition filed April 3rd, 1918.

Mose Drachman, *Clerk.*
By Effie D. Botts, *Deputy.*

In the District Court of the United States for the District of Arizona

May Term, A. D. 1918

United States of America

v.

One Vim-Auto-Truck Bearing Arizona 1918 License No. 13919

INFORMATION

Be it remembered, That Thomas A. Flynn, United States Attorney for the District of Arizona, who for the said United States in this behalf prosecutes, comes by John H. Martin, Assistant United States Attorney, into the District Court of the United States for the District of Arizona, on this the 26th day of June A. D. 1918, and for the said United States gives the Court here to understand and be informed that on the 27th day of March 1918, on land, at the Port of Nogales,

in the collection and judicial District of Arizona, Charles E. Hardy, then and there the Collector of Customs for the District of Arizona, did seize certain property, that is to say:—

One Vim Auto-Truck, bearing Arizona License No. 13919, of the estimated value of Five Hundred Dollars money of the United States of America.

That the said Charles E. Hardy, Collector of Customs as aforesaid, now holds the said property in his custody for the causes following, to wit:

(1) That prior to said seizure, to wit, on the 27th day of March 1918, one Harry Left did fraudulently and knowingly attempt to export, ship from, and take out of the United States of America, to and into the United States of Mexico, certain merchandise, to-wit, four hundred and eighty cans of milk, and which said four hundred and eighty cans of milk was being exported, shipped from, and taken out of, and intended to be exported, shipped from and taken out of the United States of America to and into the United States of Mexico, contrary to law; that is to say, without license or permit from the War Trade Board as provided for by an Act of Congress approved June 15, 1917, entitled "An Act to punish acts of interference with the foreign relations, the neutrality and the foreign commerce of the United States, to punish espionage, and better to enforce the criminal laws of the United States, and for other purposes" and the Proclamation of the President of the United States dated February 14, 1918, promulgated under and by authority of said Act.

(2) And for that the said merchandise, to wit, the said four hundred and eighty cans of milk was contained and transported in and by the property so seized, to wit, One Vim Auto-Truck, bearing Arizona

License, number 13919, and that the said Auto-Truck was on the aforesaid date used by the said Harry Left, or some other person, as a vehicle to contain and transport, and export, ship from, and take out of, and in attempting to export, ship from and take out of the United States, through the said Port of Nogales, to and into the United States of Mexico the aforesaid merchandise without license or permission so to do from the War Trade Board, in violation of the aforesaid Act of Congress, and the said Proclamation of the President, promulgated under and by authority thereof.

(3) And for that the said merchandise, to wit, the said four hundred and eighty cans of milk, so contained and transported in and by the said Auto-Truck was being transported, shipped from and taken out of the United States to and into the United States of Mexico, without the said Harry Left or any other person delivering to the Customs Officer at said Port of Nogales, Arizona, a manifest thereof, as required by the act of March 3, 1893, contrary to the form of the statute in such case made and provided.

By reason of which said premises, and by force of the statutes and Proclamation aforesaid, the said property, to wit, One Vim Auto-Truck, bearing Arizona 1918 License Number 13919 became and is forfeited to the United States.

WHEREFORE, the said United States Attorney, who prosecutes as aforesaid, for the said United States, prays that the said property, to wit, the said Vim Auto-Truck, bearing Arizona 1918 License number 13919, be forfeited to the United States, and that due process of law may be awarded in this behalf to enforce such forfeiture of the said property so seized as aforesaid, and to give notice to all persons concerned

to appear on the return day of such process, and show cause, if any they have, why such forfeiture should not be adjudged.

THOMAS A. FLYNN,
United States Attorney for the District of Arizona.
JOHN H. MARTIN,
Assistant United States Attorney.

Endorsed:
Filed June 26, 1918.

MOSE DRACHMAN, *Clerk.*

U. S. GOVERNMENT PRINTING OFFICE: 1945

No. 11,007

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

ONE PLYMOUTH TRUCK, 1940 PICKUP,
MOTOR NO. T-105-2887,
Respondent-Appellee,

and

MIGUEL MORACHIS,
Claimant-Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona.

BRIEF FOR APPELLEE.

RUFFO ESPINOSA,
Western Union Building, Nogales, Arizona,
Attorney for Claimant-Appellee and Respondent-Appellee.

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No. 11,007

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and

MIGUEL MORACHIS,
Claimant-Appellee.

Upon Appeal from the District Court of the United States for the District of Arizona.

BRIEF FOR APPELLEE.

JURISDICTION OF THE DISTRICT COURT.

The District Court had jurisdiction of this proceeding under Section 24 (9) of the Judicial Code as amended (28 U. S. Code, Section 41 (9)) as this is a suit or proceeding for the enforcement of forfeitures incurred under the laws of the United States. (R. 2, 4, 10, 11, and 14.) The laws of the United States involved are: Title VI of the Espionage Act of 1917, i.e., the Act of June 15, 1917, Chapter 30, 40 Stat. 223-225 as amended, 22 U. S. Code, Section 401-408 inc.; and

the Export Control Law of 1940 as amended, i.e., Section 6 of the War Powers Act of July 2, 1940, Chapter 508 (54 Stat. 714), as amended by the Act of June 30, 1942, Chapter 461 (56 Stat. 463), as further amended by Act of July 1, 1944, Chapter 360, 58 Stat. 671; 50 App. U.S.C. Sec. 701.

JURISDICTION OF THIS COURT.

This is an appeal from a final decision in the District Court for the District of Arizona, and no direct review may be had in the Supreme Court under Section 238 of the Judical Code. (28 U.S.C. Sec. 345.) This Court therefore has jurisdiction of this appeal under Section 128 of the Judicial Code (28 U.S.C. Sec. 225 (a)), as amended.

PRELIMINARY STATEMENT.

This is an appeal by the United States of America from a judgment rendered January 27, 1945 by the District Court of the United States for the District of Arizona in which judgment the Court ordered that one Plymouth truck be restored to Miguel Morachis, the present claimant-appellee, said Court holding as a conclusion of law that said truck was not about to be exported, shipped from, or taken out of the United States into the Republic of Mexico in violation of law, and further, that Title VI of the Espionage Act of 1917 does not authorize forfeiture of the vehicle,

despite the fact that said vehicle contained articles about to be unlawfully exported, but that said Espionage Act only authorizes seizure and detention of the vehicle so used. (R. 14.)

STATEMENT OF FACTS.

The facts are undisputed, and, concisely summarized, are: That Rodolfo Tapia, an employee of Miguel Morachis, in the absence of his employer (R. 13) who was out of town at the time, attempted to use Miguel Morachis' Plymouth truck to smuggle some lemons, grapefruit, and canned milk to Mexico by means of subterfuge and without a special license from the Foreign Economic Administration. Said truck and merchandise were promptly seized by the Collector of Customs at the Port of Nogales, Arizona. Within 30 days after said seizure a verified petition was filed in the District Court of the United States for the District of Arizona by Miguel Morachis claiming that he was the owner of said Plymouth truck and that said truck was not intended to be exported from the United States of America to the Republic of Mexico and requesting that said truck be restored to him.

At the trial, it was developed that said truck was registered under the laws of Arizona, was in constant daily use between the border towns of Nogales, Arizona and Nogales, Mexico for a period of about two years prior to the date of seizure (R. 12) and that

said truck was used by Morachis at Nogales, Arizona in his produce business. (R. 13.) Said truck had not been driven by Morachis for about five months prior to the seizure. The truck at the time of seizure was being driven by Tapia. (R. 13.) Tapia, and other employees of Morachis, used said truck with the intention of smuggling said produce and canned milk to Mexico. (R. 13.) Morachis was not a participant, either as principal or accessory, directly or indirectly, in the attempted smuggling. It is an undisputed fact that the truck itself was not being attempted to be exported to Mexico. The truck is registered in Arizona and belongs to Morachis who has his business and residence in the United States of America. (R. 11; R. 12; R. 13.) Said District Court ordered said truck restored to Morachis, and this appeal followed.

QUESTION INVOLVED.

As the agreed facts, so far as they are material to this appeal, are:

1. The articles (lemons, grapefruit and canned milk) were attempted to be unlawfully exported to Mexico by Morachis' employees without his knowledge and consent;

2. Morachis' truck was the vehicle used for the attempted unlawful exportation of said articles;

3. The truck itself was not being exported, shipped out of, or taken out of the United States in violation of law;

the question before this Court is resolved into a matter of law, e.g., whether or not Title VI of the Espionage Act of 1917, 22 U.S.C. Sec. 401-408 incl., authorizes forfeiture of Morachis' truck if it was used by his employees to take out or attempt to take out articles from the United States of America to Mexico in violation of law.

The position of Miguel Morachis, the claimant appellee, is that the statute authorizing the forfeiture of articles attempted to be exported contrary to law does not forfeit the vehicles containing such articles. The statute authorizes the seizure of such articles and the seizure of the vehicle containing them, but its forfeiture provisions covers only the articles themselves (in this case, the lemons, grapefruit, and canned milk); its foreiture provisions does not extend to and include the vehicle. Congress never intended that the vehicles be forfeited; for the whole purpose of Congress was to control ocean-going vessels and attempted unlawful exports of articles in said vessels. The vessels were to be seized and detained and not unnecessarily delayed (hence the reason for the summary hearing and admiralty procedure provided in the Act (22 U. S.C., 403-405), and the articles, but not the vessels, forfeited. Maritime traffic alone was considered by Congress, unique border traffic in time of war was not considered at all.

ARGUMENT.

POINT I.

THE STATUTE DOES NOT AUTHORIZE THE FORFEITURE OF VEHICLES CONTAINING ARTICLES ATTEMPTED TO BE EXPORTED CONTRARY TO LAW.

The correctness of appellee's contention is made manifest by a reading of the statute, 22 U.S.C. 401; with its pertinent parts italicized, it is as follows:

> "Whenever an attempt is made to export or ship from or take out of the United States any arms or munitions of war, or other articles, in violation of law, or whenever there shall be known or probable cause to believe that any such arms or munitions of war, or other articles, are being or are intended to be exported, or shipped from, or taken out of the United States, in violation of law, *the several collectors,* comptrollers of customs, surveyors, inspectors of customs, and marshals, and deputy marshals of the United States, and every other person duly authorized for the purpose by the President, *may seize* and detain *any articles* or munitions of war *about to be exported or shipped from, or taken out of the United States in violation of law and the* vessels or *vehicles containing the same,* and retain possession thereof until released or disposed of as directed in sections 402-408 of this title. *If* upon due inquiry as provided in such sections *the property seized shall appear to have been about to be so unlawfully exported, shipped from, or taken out of the United States, the same shall be forfeited to the United States.*"

It is clear that the statute does not expressly forfeit the vehicle containing the prescribed articles.

Such forfeiture can be read into the statute only by implication from the fact that it authorizes the seizure of the vehicle and from the fact that at the time the vehicle was about to be taken out of the country it was the instrumentality for a violation of law. This, however, would be contrary to all established constructions of forfeiture statutes.

POINT II.

AS FORFEITURES ARE NOT FAVORED THEY SHOULD BE ENFORCED ONLY WHEN WITHIN BOTH THE LETTER AND SPIRIT OF THE LAW.

The general principles of construction of forfeiture statutes is expressed in 23 American Jurisprudence 601 as follows:

> "Statutes imposing forfeitures by way of punishment are subject to the general rules governing the interpretation and construction of penal statutes. Hence, statutes authorizing the forfeiting of property ordinarily used for a legal purpose are to be strictly construed, since they are very drastic in their operation. It has been pointed out, however, that statutes to prevent fraud upon the revenue laws are considered as enacted for the public good and to suppress a public wrong and, therefore, although they impose forfeitures, are not to be construed, like penal laws generally, strictly in favor of the defendant, but are to be construed fairly and reasonably, so as to carry out the intention of the legislature. In accordance with the general principle that the courts sedulously avoid a construction

> which is tantamount to judicial legislation, the courts will not force upon a forfeiture statute a construction which amounts to reading into the law provisions not inserted therein by the legislature."

The revenue of the government is not involved in the case and, therefore, the statute in question is to be construed strictly in favor of the defendant. Nevertheless, even the more liberal rule of construction would not enable a Court to find authority for the forfeiture of the vehicle in the above quoted statute.

> "Forfeitures are odious, and to be declared only when clearly imposed by statute." Judge Bourquin in United States v. Two Gallons of Whisky, et al., 213 Fed. 986.

> "A statute imposing a forfeiture should be strictly construed and in a manner as favorable to the person whose property is to be seized as is consistent with the fair principles of interpretation." Judge Sanford in *United States v. One Cadillac Eight Automobile,* 255 Fed. 173.

United States v. One Model Ford V-8, 307 U. S. 219, 59 S. Ct. 861, recently laid down the rule for the construction of forfeiture statutes as follows:

> "The point to be sought is the intent of the lawmaking powers. Forfeitures are not favored; they should be enforced only when within both letter and spirit of the law."

Counsel did not find a case on point involving the war powers, but in *1942 Chevrolet Automobile v. State,* 128 Pac. (2d) 448, the Court said:

> "The law does not favor forfeiture though *police powers* may be involved, and statutes are strictly construed to avoid them."

The intent of Congress not to forfeit vehicles involved in cases under 22 *U.S.C.* 401 is established clearly by a comparision with other forfeiture statutes of the United States. Such statutes found by counsel in the United States Code are the following:

> Forfeiture of merchandise, baggage and vehicle containing same for unlading or discharging merchandise or baggage from vehicle without permit of customs officer upon arriving in United States from contiguous country. 19 *USC* 1459.
>
> Forfeiture of merchandise and vehicle containing same for failure to report or manifest merchandise imported from contiguous country. 19 *USC* 1460.
>
> Forfeiture of merchandise and container thereof or closed vehicle containing same imported from contiguous country for failure to open container or vehicle upon demand of customs officer. 19 *USC* 1462.
>
> Forfeiture of vehicle and contents for failure to deliver sealed vehicle to proper customs officers, etc. 19 *USC* 1464.
>
> Forfeiture of vehicle used in unlawful importation, transportation, etc. of merchandise into United States. 19 *USC* 483.
>
> Forfeiture of vehicle used to possess, conceal, or transport contraband articles such as narcotic drugs, firearms, counterfeit coins, etc. 49 *USC* 782.

Forfeiture of aircraft used in violation of customs or public-health laws. 49 *USC* 181.

Forfeiture of goods, containers thereof, vessel or other conveyance containing same for removal or concealment of goods upon which tax has been imposed with intent to defraud United States of such tax. 26 *USC* 3321.

Forfeiture of goods, etc. together with other personal property (including vehicles) found in building, yard or inclosure with such goods, etc. for possession of such goods, etc. for purpose of sale or removal in fraud of internal revenue laws. 26 *USC* 3720.

Forfeiture of intoxicating liquors involved in violation of Liquor Enforcement Act and vehicle used in transporting same. 27 *USC* 224.

Forfeiture of liquor and conveyances thereof for introduction of liquor into Indian Reservation. 25 *USC* 246, 247.

Forfeiture of package or parcel containing unlawfully concealed letters. 39 *USC* 499.

Forfeiture of halibut and vessel employed therewith for violation of Northern Pacific Halibut Act. 16 *USC* 772.

Forfeiture of whales and vessels involved in violation of The Whaling Treaty Act. 16 *USC* 909, 910.

Forfeiture of tobacco and boxes, barrels, machinery, etc. for removal or sale of tobacco without giving bond required by law. 26 *USC* 2161.

The uniform practice of Congress in expressly and specifically forfeiting vehicles, vessels and containers

used in connection with these various law violations is significant as to the purpose and reason for the silence of 22 USC 401 with respect to the forfeiture of vessels and vehicles involved in its violation. It indubitably means that Congress saw fit not to impose the forfeiture of vessels and vehicles in cases arising under this statute.

The obvious reason for this is that in 1917 the truck was not in general use as we know of it today while cheap oceanic traffic had reached its maturity.

"Lusitania!" That was the torch of 1917! Although the debates and reports of the 65th Congress, 1st Session, Debates, House and Conference Reports do not help to clarify the precise point here, we would have to disregard history, our Declaration of War, our righteous anger over Prussian depredations on the high seas not to realize that Congress in 1917 had its lance poised over the Atlantic.

Border crossing by trucks was not contemplated by Congress.

It devolves as a consequence that Congress saw fit not to impose the forfeiture of vessels and vehicles under the statute as it would disrupt our ocean commerce to forfeit an ocean liner worth millions of dollars and a freighter worth hundreds of thousands of dollars for an attempted exportation of articles in violation of law. The vessels and vehicles were to be seized and detained for the purpose of search for articles destined for unlawful exportation. (22 U.S.C. 401.) This control of vessels and vehicles is necessary;

without it the statute is nugatory. But, if after summary hearing, the vessel or vehicle itself is not being exported unlawfully, it is restored to its status quo without delay. (22 U.S.C. 403.) The intendment of Congress is clear in this respect. (22 U.S.C. 401-408.)

POINT III.

ONLY EXPORTS AND ATTEMPTED EXPORTS OF ARTICLES, IN VIOLATION OF LAW, ARE SOUGHT TO BE FORFEITED BY CONGRESS.

The paramount purpose of Congress, as manifested by the text of 22 *U.S.C.* 401-408, is to restrict exports in time of war. 22 *U.S.C.* 401 applies only when *attempts* or *intentions to export* in violation of law are demonstrated.

An exportation is ably defined in *U.S. v. Hill,* 34 Fed. (2d) 133, as follows:

> "An exportation is a severance of goods from the mass of things belonging to this country with the intention of uniting them to the mass of things belonging to some foreign country. The shipment of merchandise abroad with the *intention of returning the same to* the United States is not an exportation."

Applying this judical definition, do the facts in the case at bar demonstrate an attempted exportation or an intent to export in violation of law? The libelant did not produce one scintilla of evidence whereby respondent automobile was ever attempted to be severed from the mass of things belonging to the

United States. To the contrary, it was shown without dispute that the respondent automobile was always taken out of the United States with the intention of returning (daily border crossing), R. 12, Par. 11; R. 13, Par. 14; and that the respondent automobile always retained its American characteristics, e. g., American license plates and registration. (R. 12, Par. 11.)

POINT IV.

WAR STATUTES ARE CONSTRUED TO ACCOMPLISH THEIR IMPORTANT OBJECTIVES, BUT STATUTES IN DEROGATION OF PRIVATE PROPERTY, EVEN THOUGH THEY ARE WAR STATUTES, ARE STRICTLY CONSTRUED, AND AN INTENTION TO FORFEIT PRIVATE PROPERTY WILL NOT BE RAISED BY INFERENCE.

Opposing counsel, by argument, wish to *create* a statute to cover unique border conditions premised upon a statute enacted to control maritime exports. This is contrary to all principles of law, concisely presented in the Montesquieu theory of the division of powers. The judicial power of government *interprets* the law; the legislative power of government enacts the law. It is within the province of Congress to enact a law to cover unique border traffic in time of war, but up until such time as Congress chooses to do so, we are bound to interpret the law *as it is* not as we would wish it to be. The judicial branch of government cannot create laws, it may only interpret them.

Our established jurisprudence upon the construction of statutes is hereby briefly summarized:

"* * * in the application of strict construction, the courts refuse to enlarge or extend the law by construction, intendment, implication or inference, to matters not necessarily, or unmistakably implied, in order to give the statute full operation. These rules prevail even though the court thinks that the legislature ought to have made the statute more comprehensive."

50 *Am. Jur.*, 407, 408.

"* * * an intention to confiscate private property will not be raised by inference and construction from provisions of law which have ample field for other operation in effecting a purpose clearly indicated and declared. Similarly, no act of the legislature is to be construed as infringing upon the right of acquisition of property, unless its language *plainly and clearly* requires such a construction."

50 *Am. Jur.*, 424.

"The rule of strict construction of penal statutes generally requires that such statutes be constructed literally, or according to the letter."

50 *Am. Jur.*, 437.

"* * * A penal statute will not be construed to include anything beyond its letter, even though it is within its spirit."

50 *Am. Jur.*, 441.

In discussing the very section of the Espionage Act now under consideration, Judge Neterer in *United States v. 267 Gold Pieces and Automobile,* 255 Fed. 217, applied the rule of strict interpretation in the following language:

At page 219, Judge Neterer said:

> "A statutory power to divest the owner of title to the property is here enacted, and I think the mode of procedure prescribed by the act creating this power is complete and must be *strictly construed,* (italics supplied) and that the provisions are mandatory as to the essence of the thing to be done."

This statement would indicate that the statute would have been strictly construed had the point at bar been raised.

At this point, counsel feels that it would be helpful to the Court to reach for 255 F. and open the book at *page 220.*

The Court will no doubt note that Judge Neterer felt that the "spirit of the law is pregnant with points of protection (for private property) as indicated by the apt words used." The "apt words" which Congress used to restrict the statutory right of the government in the property, are many, as carefully noted by the learned Court, who stated,

> "* * * the criminal liability of the offender must not be confused with the statutory right of the government in the property."

Judge Neterer further stated:

> "Forfeiture by original seizure depends entirely upon the statute."

and at *page 221* Judge Neterer clearly indicated that the statute, 22 *U.S.C.* 401,

> "Instead of looking to the protection of the officer, sections 2 and 4 *bristle with provisions for the*

> *protection of private property* (italics supplied) and require a speedy investigation of all facts with relation to the seizure by the officers * * *"

and Judge Neterer concluded, at *page 221,*

> "* * * even if the Congress could and had intended to destroy a vested right, the limitations would not have been provided and that *it would have done so in clear language from which there is no escape."* (Italics supplied.)

CONCLUSION.

It is therefore submitted that forfeiture of the truck is not authorized by *Title VI of the Espionage Act of 1917;* for if Congress had intended that the vehicle be forfeited it would "have done so in clear language from which there is no escape," such as Congress has already done in the other statutes cited.

It is further submitted that in all other similar cases tried and heard before other tribunals or departments, that the point at issue was not raised; and, consequently, these opinions would not be persuasive or helpful to this Court.

Wherefore, claimant-appellee respectfully prays that the respondent truck be re-delivered and restored to him as owner thereof, and that the Court's judgment below to this effect be sustained.

Dated, Nogales, Arizona,
November 7, 1945.

RUFFO ESPINOSA,
Attorney for Claimant-Appellee and Respondent-Appellee.

No. 11,007

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA, *Appellant,*
vs.
ONE PLYMOUTH TRUCK, 7 BOXES OF LEMONS 307 LBS. GROSS, 2 BOXES GRAPEFRUIT 92 LBS. GROSS, 10 CASES CANNED MILK, 48 CANS EACH, "PET" AND "CARNATION" BRANDS, *Respondents-Appellees,*
MIGUEL MORACHIS, *Claimant-Appellee.*

Upon Appeal from the District Court of the United States for the District of Arizona.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

FRANK E. FLYNN,
United States Attorney,
JOHN P. DOUGHERTY,
Assistant United States Attorney,
LEAVENWORTH COLBY,
Attorney, Department of Justice,
Attorneys for the United States, Appellant.

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No. 11,007

IN THE

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Upon Appeal from the District Court of the United States for the District of Arizona.

SUPPLEMENTAL BRIEF FOR THE UNITED STATES.

CONTENTIONS OF THE PARTIES.

In the light of the appellee's arguments, it appears that a single basic question is presented by this appeal:

Whether or not the plain language of the Espionage Act of 1917, directing that the court shall decide whether the property seized for violation of the Act

shall be condemned and forfeited to the United States or shall be released and restored, is limited and restricted in some way by the last sentence of Section 1, which contains a special provision added in the course of the consideration of the Act by Congress and providing for the forfeiture of property found merely to appear to have been about to be unlawfully taken out of the United States.

The contention of the United States is that Congress in adding this special provision for the forfeiture of property found to appear to have been about to be unlawfully taken out did not intend to restrict the Act but intended to leave unaffected the Act's general provisions for condemnation and forfeiture of vehicles or vessels seized as containing articles about to be unlawfully taken out as well as all other property seized for violation of the Act. The contention of the appellee, on the other hand, is that this added special provision indicates an intention by Congress to restrict the general language of the Act and confine forfeiture to the single situation of articles appearing to be about to be exported. In appellee's own language (Br. 5):

> Congress never intended that the vehicles be forfeited; for the whole purpose of Congress was to control ocean-going vessels and attempted unlawful exports of articles in said vessels. The vessels were to be seized and detained and not unnecessarily delayed * * * and the articles, but not the vessels, forfeited. Maritime traffic alone was considered by Congress, unique border traffic in time of war was not considered at all.

In support of appellee's contention the only arguments advanced are (1) that other statutes providing for forfeitures have done so in what seems to appellee's counsel to constitute more express and specific language than that employed in this Act (Br. 9-11); (2) that "in 1917 the truck was not in general use" and "border crossing by trucks was not contemplated by Congress" and so Congress must not have intended to cover them (Br. 11, 13); and in conclusion, (3) that the practice, uniformly followed prior to this present case, of forfeiting the vehicles employed in exportation, should be disregarded since the point now at issue on this appeal cannot be shown to have been specifically raised (Br. 16).[1]

In support of the Government's contention, counsel for the United States submit (1) that the condemnation and forfeiture of all property seized for violation of the Act is provided without exception by its plain general language; (2) that the legislative history of the Act clearly shows that both its general language and the special provision added by the last sentence of Section 1 were intended to provide for the condemnation and forfeiture of the vehicles containing articles

[1]Subsequent to the taking of the present appeal the position of the court below was brought to the attention of the District Court for the Southern District of Florida, in a case where the United States had already acquiesced in the report of the Commissioner recommending that the vessel be released under the proviso of Section 5. The question could not affect the result and was not exhaustively briefed and argued. That Court, however, agreed with the court below in this case. *The Cachalot III,* 60 F. Supp. 527, 529. No appeal was attempted since the Government agreed the vessel should be released under Section 5 and there was accordingly doubt as to its appealability.

being exported as well as of the articles themselves; and (3) that nothing in the Act requires it to be so limited or restricted as to exclude from forfeiture vehicles or vessels which are themselves unlawfully taken out of the United States while containing articles being exported.

ARGUMENT.

I.

THE CONDEMNATION AND FORFEITURE OF ALL PROPERTY SEIZED FOR VIOLATION OF THE ACT IS PROVIDED WITHOUT EXCEPTION BY ITS PLAIN GENERAL LANGUAGE.

In view of appellee's contention that the Act is absolutely silent with respect to the forfeiture of vehicles involved in its violation (Br. 11), we take the liberty of setting forth the pertinent clauses of the Act's plain general provisions which the United States contends are fully dispositive of this case. Appellee's statement, based apparently upon its construction of the last sentence of Section 1,[2] is diametrically opposed to the Government's position that these provisions fully authorize the condemnation and forfeiture of the vehicle

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[2]It appears probable, although appellee nowhere so states, that this statement is based upon the contention that the last sentence of Section 1 of the Espionage Act (22 U.S.C. 401) contains the Act's only provision for condemnation and forfeiture. This position, which is untenable in the light of the Act's legislative history as well as of the plain meaning of its general provisions, was expressly adopted by Judge Holland in *The Cachalot III*, 60 F. Supp. at 529. The Court below adopted a more conservative position and merely concluded that the Act "does not authorize forfeiture of a vehicle containing articles about to be unlawfully exported" (R. 14).

subject to the court's discretion to order it restored upon the giving of a bond against its employment in further violations.

Section 1 (40 Stat. 223-224; 22 U.S.C. 401) provides for the seizure of articles being unlawfully exported and the vehicles containing the same. The pertinent language, with emphasis supplied, is:

> Whenever an attempt is made to export or ship from or take out of the United States, any arms or munitions of war, or other articles, in violation of law, or whenever there shall be known or probable cause to believe that any such arms or munitions of war, or other articles, are being or are intended to be exported, or shipped from, or taken out of the United States, in violation of law, * * * [the persons authorized by the Act] may seize and detain any articles or munitions of war about to be exported or shipped from, or taken out of the United States, in violation of law, *and the vessels or vehicles containing the same,* and retain possession thereof *until released or disposed of as hereinafter directed.*

Section 3 (40 Stat. 224, 22 U.S.C. 403) provides how, in the event the owner makes a claim for restoration, the Court shall hear and decide whether the property seized shall be condemned and forfeited to the United States or restored to the claimant. It should be noted that it lumps all seized property together and does not distinguish nor except from forfeiture the vehicles or vessels seized as containing the articles being exported. With emphasis supplied, the language pertinent is:

> The owner or claimant *of any property seized* under this title may, at any time before condemnation proceedings have been instituted, as hereinafter provided, file his petition for its restoration * * * whereupon the court * * * after causing notice to be given to the United States Attorney for the district and to the person making the seizure, shall proceed to hear and decide *whether the property seized shall be restored to the petitioner or forfeited to the United States.*

Section 4 (45 Stat. 1423-1424; 22 U.S.C. 404; cf. 40 Stat. 224), provides how, upon the filing of a libel for condemnation of the property seized, the Court shall hear and decide whether the property shall be condemned and forfeited. Again, it must be noted, all the property seized is lumped together and no exception or distinction is made of the vehicles or vessels seized as containing the articles to be exported. The pertinent language, with emphasis supplied, reads:

> Whenever the person making *any seizure* under this title applies for and obtains a warrant for the detention *of the property* and (a) upon the hearing and determination of the petition of the owner or claimant restoration is denied, or (b) the owner or claimant fails to file a petition for restoration * * * the United States Attorney for the district wherein it was seized, upon the direction of the Attorney General, shall institute libel proceedings * * * *against the property* for condemnation; and *if*, after trial and hearing of the issues involved, *the property is condemned, it shall be disposed of by sale,* and the proceeds thereof, less the legal costs and charges, paid into the Treasury. * * *

Section 5 (40 Stat. 225; 22 U.S.C. 405), after providing that the proceedings should follow those on the admiralty side of the court, authorizes the court to release and restore the property upon the giving of a bond against its further unlawful employment as an instrumentality for violation of the Act. With emphasis supplied to the pertinent language, it reads:

> *Provided;* That upon the payment of the costs and legal expenses of both the summary trials and the libel proceedings herein provided for, and the execution and delivery of a good and sufficient bond in an amount double the value *of the property seized,* conditioned that it will not be exported or *used or employed* contrary to the provision of this title, the court, in its discretion, may direct that it be delivered to the owners thereof or to the claimants thereof.

And here again is further indubitable proof that Congress had in mind the forfeiture of the vehicles or vessels employed and seized as instruments of the contraband traffic. The condition of the bond that the property will not be "*used or employed* contrary to the provisions of this Act" can apply only to further use of the vehicle or vessel as the instrumentality of the unlawful traffic.

It is thus abundantly plain that the instant case may not be regarded as involving the silence of Congress or its failure to make any provision for condemnation and forfeiture of vehicles or vessels seized while about to be taken out of the United States containi
es which are themselves being unlawfully exported. It

is rather a question of whether general language plainly providing for condemnation and forfeiture has been limited or restricted in some manner by the effect of other language found within the four corners of the Act.

Nor is there anything novel in providing for the condemnation and forfeiture of vehicles or vessels which are the mere instrumentality of violation. The general policy of forfeiting the vehicle or vessel employed in violating embargo and non-intercourse laws was established almost from the foundation of the Republic and has always been regarded as necessary to their effective enforcement. Several early and familiar examples may illustrate the practice. Section 1 of the Act of January 9, 1809, c. 5, 2 Stat. 506, provided that for the violation of the Act "all such specie, goods, wares and merchandise, and also the ship, vessel, boat, water craft, cart, wagon, sled, or other carriage or vehicle, on board, or in which the same may be so put, placed, or loaded as aforesaid, shall be forfeited." Section 2 of the Act of December 17, 1813, c. 1, 3 Stat. 89, similarly provided that "all such specie, goods, wares, merchandise, produce, provisions, naval or military stores, livestock, and also the ship, vessel, boat, watercraft, cart, wagon, sled, or other carriage or vehicles, on board, or on or in which the same may be so put, placed, or loaded as aforesaid, and also all horses, mules, and oxen, used or employed in conveying the same, shall be forfeited." Section 3 of the Act of February 4, 1815 c. 31, 3 Stat. 196, likewise directed that "such naval or military

stores, arms, or the munitions of war, cattle, livestock, articles of provisions, cotton, tobacco, goods, money, or other supplies, together with the carriage or wagon, cart, sleigh, vessel, boat, raft, or vehicle of whatsoever kind, or horse, or other beast, by which they, or any of them are transported, or attempted to be transported, shall be forfeited."

Far from the border traffic by means of vehicles being, as appellee argues, new and unique or outside the ambit of Congressional intent, it has always been recognized as present and requiring specific provision as in the Act of 1917. If anything is new, it is the conception of the vehicle itself as an article of contraband exportation. It seems unlikely that the vehicle itself was ever, until the development of the motor car, more than a mere instrumentality of the illegal traffic. But provision for the forfeiture of the vehicle or vessel which is employed in violating the law has always been essential.

It is obvious, indeed, that merely forfeiting the articles, while permitting the vehicle to be returned to its owner, cannot sufficiently deter offenders from attempting to export other articles without a license. Especially must this be so whenever the profit to be gained by unlawful exportation is high and the risk of detection is not great. The only effective method of preventing recurrent violations is, accordingly, to condemn the instrumentality used to perpetrate the offense. The importance of the sanction of forfeiture is illustrated by cases, differing but little from that now at bar, where the vehicle is owned by an alien non-

resident who is beyond the reach of our criminal laws and the persons driving the vehicle are his agents or employees. It is evident that in such cases criminal punishment of the agent and forfeiture of only the articles transported, without forfeiture of the transporting vehicle, must be an insubstantial weapon against the non-resident owner of the vehicle, who can make repeated attempts by the hands of many different agents to get the contraband goods across the border.

It is thus impossible to conclude that Congress in 1917 was not just as fully aware of these facts as were the Congresses which a hundred years earlier had passed other non-intercourse acts. The history of Espionage Act of 1917 plainly indicates they were.

II.

THE LEGISLATIVE HISTORY OF THE ACT SHOWS IT WAS INTENDED TO PROVIDE FOR THE FORFEITURE OF VEHICLES CONTAINING ARTICLES BEING UNLAWFULLY EXPORTED.

It is clear from the history of the Act that the plain general language of Sections 1, 3 and 4, as quoted, sufficiently authorizes the condemnation and forfeiture of all property involved, including the vehicles employed, without any resort to the special provision found in the last sentence of Section 1. That sentence was not even found in the Bill as originally prepared in the Department of Justice and submitted to the Sixty-fourth Congress. It was added only in the later

version subsequently introduced in the Sixty-fifth Congress.

The Espionage Act of 1917 as finally passed in the first session of the Sixty-fifth Congress was designated as H.R. 291, but the Bill originated in the Senate during the second session of the Sixty-fourth Congress. Title VI, the neutrality and export control provisions with which we are here concerned (Cf R. 14), was submitted by the Attorney General on the instructions of President Wilson as one of the fourteen Bills dealing with neutrality, revelation of defense secrets, espionage and kindred matters.[3] As originally reported to the Senate by the Judiciary Committee, it was designated S. 6811 of the Sixty-fourth Congress (54 Cong. Rec. 2819). In the form in which they were reported from Committee on February 8, 1917, Sections 1 and 4 of S. 6811, together with its title, expressly provided for the condemnation and forfeiture of the vessels or vehicles containing arms and munitions of war about to be illegally exported. With emphasis supplied to the pertinent language, the provisions read (54 Cong. Rec. 3416):

> An Act to authorize the seizure, detention, *and condemnation* of arms and munitions of war in course of exportation or designed to be exported or used in violation of the laws of the United States, *together with the vessels or vehicles in which the same are contained.*
>
> Sec. 1. Whenever, under any authority vested in him by law, the President of the United States

[3]See explanation of Senator Overman, 55 Cong. Rec. 1787.

by proclamation, or otherwise, shall forbid the shipment or exportation of arms or munitions of war from the United States to any other country, or whenever there shall be good cause to believe that any arms or munitions of war are being, or are intended to be employed or exported, * * * [the persons authorized hereby] may seize and detain any arms or munitions of war about to be so exported or employed *and the vessels or vehicles containing the same,* and retain possession thereof *until released, or disposed of as hereinafter directed.*

* * *

Sec. 4. Whenever the persons making *any seizure* under this chapter shall have applied for and obtained a warrant for the detention *of the property,* and the owner or claimant shall have filed a petition for its restoration as provided in this chapter, and upon the hearing and determination of said petition restoration shall have been denied, or where such owner or claimant shall have failed to file a petition for restoration, * * * the United States attorney for the district wherein it was seized, upon direction of the Attorney General, shall institute libel proceedings * * * *against said property* for condemnation, and if after trial and hearing of the issues involved *the property shall be condemned, it shall be disposed of by sale,* and the proceeds thereof, less the legal costs and charges shall be paid into the Treasury of the United States.

It is submitted that this provision for condemnation and forfeiture of the vehicles containing the articles

is clear and ample without the added final sentence of Section 1. But it is equally clear that the last added sentence was also intended by Congress to extend to the vehicles or vessels which are merely taken out of the United States with their cargo of contraband and are not themselves intended to be exported.

In the course of the Sixty-fourth Congress the original fourteen Bills were consolidated and S. 6811 became chapter 9 of S. 8148 (54 Cong. Rec. 3613). In the Sixty-fifth Congress the consolidated Bill was reintroduced in the Senate as S. 2 and as H. R. 291 in the House. In the Senate the neutrality and export control provisions became chapter 6 of S. 2 (55 Cong. Rec. 794). While the Senate Bill was under consideration, the Attorney General sent to the committee a proposed addition, relating to the control of exports generally. The reported debates show that one of the purposes of this addition was to help relieve a shortage of tin plate, which was being exported to various neutral countries. In secret sessions, however, it was disclosed that its fundamental purposes was to enable the United States to carry on economic warfare against neutral countries which were assisting the Germans by food and supplies.[4] At the time there appeared to be serious doubt as to whether these additional provisions could be incorporated into the pending Bills or would be so delayed that it would be necessary to enact them as a separate statute.[5] To meet this doubt and

[4]See explanation of Senator Overman, 55 Cong. Rec. 1787

[5]The Attorney General's proposal was adopted in time, however, and became Title VII of the Act (40 Stat. 225).

make some general export control available at the earliest possible moment, the Attorney General suggested that chapter 6, which then covered the control of only arms and munitions about to be exported, should be strengthened by a provision permitting the forfeiture of articles which should merely *appear to have been* about to be *unlawfully taken out* and broadened by adding "or other articles" as well as arms and munitions.

The suggestions were accepted, partly in the revised Bill as reintroduced, partly by committee amendment, and partly by conference amendment. The Senate, on April 18, 1917, adopted a text under which the language of Section 1 became (55 Cong. Rec. 794):

> Sec. 1. Whenever, under any authority vested in him by law, the President of the United States, by proclamation or otherwise, shall forbid the shipment or exportation of arms or munitions of war, *or other articles* the export of which is made unlawful by or under any statute, from the United States to any other country, or whenever there shall be good cause to believe that any arms or munitions of war or other articles the export of which is made unlawful, are being or are intended to be employed or exported in connection with a military expedition or enterprise forbidden * * * [the persons authorized hereby] may seize and detain any arms or munitions of war *or other forbidden property* about to be so exported or employed, *and the vessels or vehicles containing the same,* and retain possession thereof *until released or disposed of as hereinafter directed.* If upon the due inquiry, as hereinafter provided,

> the property seized *shall appear to have been about to be so unlawfully exported, used, or employed, the same shall be forfeited to the United States.* (Italics supplied.)

As a result of the exigencies of parliamentary procedure, when the House Bill, H. R. 291, came to the Senate, the latter substituted S. 2, including the quoted language, retaining only the designation H. R. 291 (55 Cong. Rec. 2014) and so adopted the Bill, which following slight modifications in conference, the Bill as adopted became law.[6]

One of the modifications introduced in conference, however, affected Section 1 of what had now become Title VI and is of outstanding significance here. For the expression "so unlawfully exported, used or employed", as contained in the added last sentence and in the corresponding clause of the first sentence, as passed by the Senate, the conference substituted the expression "so unlawfully exported, shipped from *or taken out of the United States.*" The reasons for the change which had been earlier recommended by the Attorney General, are not discussed in the conference reports nor in the debates. Its results for the meaning of the statute, however, are obvious. Exportation, as is well known, requires not only an intent to sever the articles to be exported from the mass of goods in the country from which the articles are being taken out but also an intent to make

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[6]See Conference Reports H. Rep. 65 and 69 [Ser. vol. 7252] and 55 Cong. Rec. 3307, 3498, 3870.

them a part of the mass of goods in the country into which they are to be introduced. Cf. *United States v. Hill,* 34 F.(2d) 133 (1929, C.C.A. 2.) Obviously, this is not the case with the vehicles and vessels employed as instruments of the violation. Such vehicles or vessels are unlawfully taken out in the course of violating the Act; they are not exported. This new expression makes it certain that this special provision, like the general language of Sections 1, 3, 4 and 5, was intended to apply not only to the articles exported but also to vehicles or vessels unlawfully taken out while employed in containing them—objects which are, of course, not intended to be exported but, on the contrary, are "unlawfully taken out" with the intention of being returned to the United States and repeatedly used as the instrumentality of violations of the export control laws.

It is thus impossible to accept appellee's contention that Congress intended to restrict forfeiture to articles which appear to be about to be exported. The consideration of appellee's arguments confirms this view.

III.

NOTHING IN THE ACT LIMITS OR RESTRICTS ITS PLAIN GENERAL LANGUAGE SO AS TO EXCLUDE FROM FORFEITURE THE VEHICLES CONTAINING THE ARTICLES BEING EXPORTED.

Appellee can point to nothing anywhere in the Act itself purporting to except from the operation of the act's general provisions for condemnation and for-

feiture the vehicles which have been seized as containing articles being unlawfully exported. Appellee thus appears to put his sole reliance upon an attempt at interpreting the added final sentence of Section 1 as authorizing the forfeiture only of articles about to be exported. But that sentence as ultimately enacted provides:

> "If upon due inquiry as hereinafter provided, the property seized *shall appear to have been* about to be so unlawfully exported, shipped from, *or taken out* of the United States, *the same shall be forfeited* to the United States. (Italics supplied.)

Appellee seems to believe that since the sentence provides that property found to "appear to have been about to be unlawfully exported" shall be forfeited it implies that only such property may be condemned and forfeited and, since the intent is obviously not to export the vehicles containing the unlawful exports but rather to use them in repeated future violations, the vehicles are not property "about to be exported" and so should not be forfeited. But that interpretation disregards the words "or taken out of the United States" which were added to the sentence in the course of the conference proceedings on the Bill. Certainly the words were evidently intended to add something to the term "exported" else the conferees would not have seen fit to insert them into the language which had been adopted by the Senate. It is submitted that they were added to cover just such things as vehicles or vessels which are merely "unlawfully taken out of the United States" while

containing the articles about to be exported—things which typically, although they are not to be *exported,* are none the less to be *taken out,* later brought back, and repeatedly employed unlawfully as the instrumentalities of the contraband traffic.

Fairly construed the sentence does not imply that only property about to be exported and no other property shall be forfeited. In no event are its terms restrictive. It neither states nor implies that vehicles or vessels containing articles being exported shall not, in accordance with the first sentence of Section 1, be "disposed of as hereinafter directed" by condemnation and forfeiture as provided in the applicable provisions of Sections 3 or 4 subject to the court's power to restore them under the proviso of Section 5. It is merely an additional special provision for the forfeiture of property found to "*appear to have been about to be so unlawfully* exported, shipped from or *taken out* of the United States." (Italics supplied.) Nothing indicates that the language is intended to restrict the operation of the statute. It obviously has another purpose; that of broadening the Act. This provision for the forfeiture of property which is found to "*appear to have been about to be*" taken out represents a very distinct enlargement of the general provisions of the Act which apply only where either (a) there is actually an *attempt* to export or take out unlawfully, or (b) there is probable cause to believe that the articles "are *being* or are *intended to be* exported or taken out unlawfully." (Italics supplied.) Both seizure for an *attempt* to take out and for *probable cause* to be-

lieve there is an *intention* to take out requires the officer seizing to have specific information in advance of the seizure of a deliberate decision on the part of those in control of the property to employ it unlawfully. In both situations it is necessary to prove that *before* the seizure the officer had evidence of this *animus* on the part of those in control of the articles; a matter which is always difficult. The added provision of the last sentence for forfeiture of property which is *later* found to appear to have been about to be exported or taken out, involves no such difficult requirement. Even though the original seizure might have been invalid for want of probable cause, by virtue of this added provision it will suffice that the evidence produced *on the hearing* establishes that it *then* appears that it was about to be exported or taken out unlawfully.

Moreover, if appellee's contention that the last sentence defines the exclusive limits of the power to forfeit were accepted, the entire Act would become unworkable and the intention of Congress would be defeated. This special provision of the last sentence extends only to property which "*appears* to have been *about* to be" taken out. If interpreted in accordance with appellee's contention, not only would this added provision of Section 1 prohibit the forfeiture of the vehicles and vessels which contain articles being exported, as provided by the general language of the Act, but equally it would prohibit the forfeiture of the articles themselves once they had gone beyond the point where they were "*about* to be exported or taken out" and had reached the point

where they were actually "*being* exported or taken out". It might also be argued that in accordance with the last sentence the realities of the situation are to be completely disregarded and the *only* question held to be not whether there *was* a violation but what the *appearances* were.[7]

It is submitted therefore that appellee's contention should not be accepted but instead the Act should be given a reasonable interpretation calculated to give effect to the undoubted intention of Congress to prevent unlawful exportation. "A thing may be within a statute but not within its letter, or within its letter and yet not within the statute," said the Supreme Court in *Jones v. Guaranty Co.*, 101 U. S. 622, 626 (1879), "The intent of the lawmaker is the law." And, as this Court observed in *United States v. Manstad,* 134 F. (2d) 986, 988 (1943, C. C. A. 9), "Strictness of construction should not defeat the real objective of Congress."

Finally, appellee appears to urge that the forfeiture of the vehicle or vessel be regarded as a Draconian measure and lays stress upon the fact that he was not personally a participant, directly or indirectly, in the attempted smuggling. (Br. 4.) But the problem of interpretation here is like that in *United States v. Fischer,* 2 Cranch 358, 387-390 (1805) where a similiar attempt was made to

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[7]This, amazing as it would seem, is the position actually adopted by Judge Holland in *The Cachalot III*, 60 F. Supp. at 528, where he says the question under the statute is not "whether the owner intended to export the lumber * * * but * * * whether the property seized shall *appear to have been* about to be so unlawfully exported * * *". (Italics supplied.)

narrow the general language of a statute and Chief Justice Marshall said (p. 390):

> "* * * if the intention of the legislature be expressed in terms which are sufficiently intelligible, to leave no doubt in the mind, when the words are taken in their ordinary sense, it would be going a great way, to say that a constrained interpretation must be put upon them to avoid an inconvenience which ought to have been contemplated in the legislature, when the Act was passed, and which in their opinion, was probably over-balanced by the particular advantages it was calculated to produce."

In any case no problem of such an inconvenience or harshness is presented by the case at bar. Congress was aware of the earlier embargo and non-intercourse acts and of the necessity of forfeiture of vehicles and vessels as a means of enforcement, but Congress was just as fully aware that the penalty of forfeiture, in some cases, might be inequitable and harsh. It accordingly added to Section 5 (40 Stat. 225; 22 U. S. C. 405) the proviso leaving to the discretion of the court whether or not the property condemned should be forfeited or, instead, should be restored to the owner or claimant upon his giving security against future violation.[8] Under this proviso appellee will

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[8]It is ordinary legislative practice to provide for the forfeiture of vehicles and vessels used by servants and employees in the violation of the law although the master and owner is unaware of the wrong. See annotation 5 A.L.R. 213. It is equally common to authorize mitigation in such and many other circumstances where the owner can demonstrate his innocence. *United States v. One Ford Coach*, 307 U.S. 219, 226 (1939); see annotation 47 A.L.R. 1055; 61 A.L.R. 551; 73 A.L.R. 1087; 82 A.L.R. 607; 124 A.L.R. 288.

have full relief if he can but satisfy the court of his contention that he had no knowledge of the smuggling.

CONCLUSION.

It is therefore submitted that not only under the plain general language of the first sentence of Section 1 together with Sections 3 and 4 of the Act but also under the last sentence of Section 1, the Plymouth Truck here involved should be condemned and forfeited to the United States. Accordingly, appellant respectfully submits that the case should be remanded to the District Court with instructions to declare the vehicle forfeited to the United States and to take such further proceedings as may be required.

Dated, January 18, 1946.

Respectfully submitted,

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